

No. 12703

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United States  
Court of Appeals  
for the Ninth Circuit.

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UNION PACKING COMPANY,  
Appellant,  
vs.  
CARIBOO LAND & CATTLE CO., LTD.,  
Appellee.

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Transcript of Record

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Appeal from the United States District Court,  
Southern District of California,  
Central Division.

FILED

JAN 8 1951

PAUL P. O'BRIEN,  
CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

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For Appellee:

FREDERICK W. MAHL, JR.,

610 Rowan Bldg.,

458 S. Spring St.,

Los Angeles 13, Calif.

In the District Court of the United States in and  
for the Southern District of California, Central  
Division

No. 10617-C

CARIBOO LAND & CATTLE CO., LTD., a corporation,

Plaintiff,

vs.

UNION PACKING COMPANY, a corporation,  
Defendant.

### COMPLAINT FOR MONEY

Comes now Cariboo Land & Cattle Co., Ltd., plaintiff above named and for cause of action against Union Packing Company, defendant above named, alleges:

#### I.

The ground upon which the jurisdiction of this Court depends is diversity of citizenship. Plaintiff is, and at all of times herein mentioned was, a corporation organized and existing under the laws of the Province of British Columbia, Dominion of Canada and a citizen thereof. Defendant is, and at all of the times herein mentioned was, a corporation organized and existing under the laws of the State of California and a citizen thereof and maintaining its principal office and place of business in the County of Los Angeles, State of California. [2]

#### II.

At all of the times herein mentioned, plaintiff



was engaged in the business of breeding and raising beef cattle upon its ranches near Williams Lake, British Columbia, Canada, and defendant was engaged in the cattle slaughtering and meat packing business in the County of Los Angeles, State of California.

### III.

On or about the 10th day of September, 1948, plaintiff and defendant entered into an oral contract pursuant to which the parties agreed that plaintiff would sell and deliver to defendant in the County of Los Angeles, State of California, two hundred and fifty-four (254) head of cattle and that defendant would purchase the same and pay to plaintiff therefor in the said County immediately after defendant had slaughtered the same a sum of not less than forty-six (\$.46) cents for each pound of dressed beef defendant processed therefrom, but in the event at the time defendant slaughtered the cattle the market price of any of the grades of dressed beef processed therefrom exceeded forty-six (\$.46) cents a pound, defendant would pay plaintiff such market price upon such grades. Defendant further agreed pursuant to said contract to pay to plaintiff in addition to the foregoing and as part of said purchase price two (\$.02) cents a pound for the difference between the weight of said cattle at the time of delivery to defendant and the weight of the dressed beef defendant processed therefrom (in the meat packing industry and hereinafter called "offal").

## IV.

Pursuant to said contract, plaintiff delivered said cattle to defendant in the said County on or about October 8, 1948, and thereafter defendant slaughtered the same. Plaintiff has performed all of the terms and conditions of said contract on its part to be performed. [3]

## V.

Plaintiff does not know and has no means of ascertaining when defendant slaughtered said cattle, the aggregate number of pounds of dressed beef defendant processed therefrom, the number of pounds of the various grades of dressed beef defendant processed therefrom, the market price at the time defendant slaughtered said cattle of the various grades of dressed beef defendant processed therefrom, or the number of pounds of offal defendant processed from said cattle. Said facts and each of them are well known to defendant.

## VI.

Although demand has been made upon defendant therefor, defendant has failed and refused to account to plaintiff for the sums due plaintiff under and pursuant to said contract. Plaintiff has received on account thereof the sum of fifty one thousand three hundred dollars and seventy cents (\$51,300.70) and there is now due and owing and unpaid under said contract from defendant to plaintiff a sum in excess thereof, the amount of which is unknown to plaintiff but well known to defendant, together with interest thereon.

Wherefore, Plaintiff prays judgment against defendant as follows:

(1) That defendant be ordered to account to plaintiff and to this Court for the sum now due and owing plaintiff under said contract, and

(2) For judgment in the amount of the sum so found to be due and owing from defendant to plaintiff with interest thereon from the date the same became due until paid, and

(3) For such other and further relief as may be just in the premises.

/s/ PATRICK DRAKE, JR.,  
Attorney for Plaintiff. [4]

State of California  
County of Los Angeles—ss.

Ben Jaffe, being sworn, says: That he is the Vice President of Cariboo Land & Cattle Co., Ltd., a corporation, the above named plaintiff, and is authorized to make this verification for and on behalf of said corporation; that he has read the foregoing Complaint and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on his information or belief, and as to those matters he believes it to be true.

/s/ BEN JAFFE.

Subscribed and sworn to before me on Nov. 21, 1949.

[Seal]      /s/ BENJ. H. FLESHER,  
Notary Public in and for  
Said County and State.

My Commission Expires Dec. 8, 1950.

[Endorsed]: Filed November 28, 1949. [5]

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[Title of District Court and Cause.]

## ANSWER

Comes now the Union Packing Company, the defendant in the above entitled action, and answering plaintiff's complaint on file, herein alleges as follows:

### I.

Answering Paragraph I of said complaint, defendant admits that it is a corporation and is a citizen of California, with its principal place of business in the County of Los Angeles.

The defendant has no information as to the status of the plaintiff herein, and for lack of such information or belief denies the other allegations in said Paragraph I.

### II.

Defendant denies the allegations of Paragraph III and IV of plaintiff's complaint. [6]

### III.

Answering Paragraph V of plaintiff's complaint,

defendant denies that it has purchased any cattle from plaintiffs, the payment for which depended upon the slaughter of the cattle or the dressed beef processed therefrom or the number of pounds or grades of dressed beef processed therefrom or the market price at the time defendant slaughtered cattle of grades of dressed beef or pounds of offal therefrom, and, therefore, denies the allegations of said Paragraph V.

IV.

Defendant denies the allegations of Paragraph VI.

Wherefore, defendant prays that plaintiff take nothing by its complaint, that defendant may have its costs and such other relief as the court may find just and proper.

/s/ BENJAMIN W. SHIPMAN,  
Attorney for Defendant  
Union Packing Company,  
a corporation.

Receipt of copy acknowledged.

[Endorsed]: Filed January 20, 1950. [7]



[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS  
OF LAW

The above entitled cause came on regularly for trial on the 20th day of June, 1950, before the above entitled Court sitting without a jury, a jury having been waived, Honorable James M. Carter, Judge presiding, Frederick W. Mahl, Jr., appearing for the plaintiff, and Benjamin W. Shipman, for the defendant; evidence both oral and documentary having been introduced and the cause submitted for decision, the Court now makes its Findings of Fact as follows:

I.

Plaintiff is, and at the time of the filing of the complaint, was a corporation organized and existing under the laws of the Province of British Columbia, Dominion of Canada, and a citizen thereof, and the defendant is, and at the time of the filing of the complaint herein was a corporation organized and existing [15] under the laws of the State of California, and a citizen thereof, and maintaining its principal office and principal place of business in the County of Los Angeles, State of California.

II.

During the entire year 1948, plaintiff was engaged in the business of breeding and raising beef cattle upon its ranches near Williams Lake, British Columbia, Canada, and defendant during said time was engaged in the cattle slaughtering and meat packing business in the City of Los Angeles, California.

## III.

During the entire year 1948, Mr. John Wade was and now is President, Mr. Ben Jaffe was and now is Vice President and Mr. Ray Swanson, then was General Manager of the plaintiff corporation, and Mr. Adolph Miller then was and now is President and General Manager of the defendant corporation.

## IV.

In the month of May or June, 1948, said Wade, Swanson and Miller had a conversation during which said Miller stated that he would be interested on behalf of defendant in purchasing the type of cattle plaintiff was raising and said Wade stated that he would get in contact with Miller in August or September, 1948, when plaintiff's cattle would be ready for sale.

## V.

On September 8, 1948, the said Wade, acting for and on behalf of plaintiff, orally advised said Miller that plaintiff then had approximately 250 head of cattle which would shortly be ready for shipment and said Miller, acting for and on behalf of defendant, orally advised said Wade that defendant would pay to plaintiff as purchase price of approximately 250 head of cattle delivered in Los Angeles, California, a minimum of 46c for each pound of dressed beef plus 2c for each pound of offal processed from said cattle. [16]

## VI.

On September 10, 1948, said Wade, acting for and on behalf of plaintiff, orally advised said Miller

that approximately 250 head of cattle would be ready for sale before October 1, 1948, and requested said Miller to confirm defendant's offer to purchase the same referred to in Finding V hereof and said Miller, acting for and on behalf of defendant, then orally stated to said Wade that defendant would pay to plaintiff for approximately 250 head of said cattle delivered to defendant in Los Angeles, California, a minimum purchase price of 46c for each pound of dressed beef plus 2c for each pound of offal processed from said cattle, that such was to be regarded by plaintiff as a firm commitment of defendant and said Miller at said time, acting as aforesaid, requested plaintiff to ship approximately 250 head of cattle to defendant at Los Angeles, California.

#### VII.

The term "offal" as used in the business of breeding and raising beef cattle and in the slaughtering and meat packing business means the residue of the animal after extracting from it the dressed beef.

#### VIII.

Between September 24, 1948 and September 27, 1948, there was a telephone conversation between said Swanson, then acting for and on behalf of plaintiff and who was then at Williams Lake, British Columbia, Canada, and said Miller, who was then in Los Angeles, California, at which time said Miller, acting for and on behalf of defendant, advised said Swanson that defendant had a deal respecting approximately 250 head of plaintiff's cattle



and then requested plaintiff, through said Swanson, to send approximately 250 head of cattle to Los Angeles, California, consigned to defendant.

### IX.

In reliance upon the statements of said Miller as found [17] in Findings V and VI hereof, and as confirmed by said Miller as found in Finding VIII hereof and pursuant to the request of said Miller that plaintiff send approximately 250 head of cattle to defendant at Los Angeles, California, as found in Finding VIII hereof, plaintiff the night of the conversation found in Finding VIII hereof shipped out of Williams Lake, British Columbia, Canada, 248 head of cattle to Vancouver, British Columbia, en route to defendant at Los Angeles, California.

### X.

On September 28, 1948, at 10:30 o'clock A.M. of said day, said Swanson, acting for and on behalf of plaintiff, sent a telegram to said Miller addressed to him at Union Packing Company, Los Angeles, California, advising said Miller that ten carloads of cattle were being sent that day, which said telegram the said Miller received in due course of transmission.

### XI.

No officer, agent or employee of defendant communicated with any officer, agent or employee of plaintiff between the time of the telephone conversation found in Finding VIII hereof and one or two

days after September 28, 1948, when said Swanson met with said Miller at the latter's office in Los Angeles, California.

## XII.

In reliance upon the statements of said Miller as found in Findings V and VI hereof and as confirmed by said Miller as found in Finding VIII hereof and pursuant to the request of said Miller that plaintiff send approximately 250 head of cattle to defendant at Los Angeles, California, as found in Finding VIII hereof, plaintiff sent 248 head of cattle consisting of ten carloads from Vancouver, British Columbia, Canada, consigned to defendant at Los Angeles, California.

## XIII.

Plaintiff transported said cattle from Williams Lake, British Columbia, to Vancouver, British Columbia, Canada on the [18] Pacific Great Eastern Railroad and from Vancouver, British Columbia, to Los Angeles, California, on the Northern Pacific Railroad and the Southern Pacific Company which was the fastest and best means of transporting said cattle from Williams Lake, British Columbia, Canada, to Los Angeles, California. Said cattle left Vancouver, British Columbia, for Los Angeles, California, on September 29, 1948.

## XIV.

It is the custom and practice in the cattle breeding and raising business when cattle are shipped to fulfill an offer to purchase the same to consign

the cattle directly to such purchaser. It is further the custom in said business when cattle are shipped for sale upon the open market to consign them to the shipper at the point of destination.

### XV.

In reliance upon the statements of said Miller as found in Findings V and VI hereof and as confirmed by said Miller as found in Finding VIII hereof and pursuant to the request of said Miller that plaintiff send approximately 250 head of cattle to defendant at Los Angeles, California, as found in Finding VIII hereof, plaintiff expended to transport said cattle from Vancouver, British Columbia, to Los Angeles, California, the sum of \$6,327.12 together with the sum of \$3,822.00 for U. S. Custom duty, or a total sum of \$10,149.12.

### XVI.

At all times during the months of September and October, 1948, the said Miller knew that in order to transport said cattle from British Columbia, Canada, to Los Angeles, California, it would be necessary for plaintiff to expend large sums of money for transportation and U. S. Custom duty.

### XVII.

One or two days after September 28, 1948, and prior to October 6, 1948, said Swanson met with said Miller in Los Angeles, [19] California, at the latter's office, at which time said Miller, acting for and on behalf of the defendant stated to said Swanson that defendant had no contract or arrangement

with plaintiff for the purchase of said cattle and at all times thereafter has denied that defendant had any contract or arrangement for the purchase of said cattle. At said time one Mel Hart, an agent and employee of defendant acting for and on behalf of the defendant and in pursuance to instructions of said Miller, caused the delivery of said cattle to be diverted from the stock yards of the defendant to the Union Stock Yards at Los Angeles, California. The said Union Stock Yards are not owned or controlled by defendant Union Packing Company and is a place where a number of cattle commission firms, including Southwest Commission Company, carry on their business.

#### XVIII.

Said 248 head of cattle arrived at Los Angeles, California, on Wednesday, October 6, 1948, and through error of the Southern Pacific Company were unloaded from the cars at the stock yards of Southern Pacific Company in Los Angeles, California. The said cattle were then transported to the Union Stock Yards in Los Angeles, California, pursuant to the diversion ordered by the defendant referred to in Finding XVII hereof. Upon the arrival of said cattle at Los Angeles, California, defendant refused to accept delivery of the same.

#### XIX.

During the months of September, 1948 and October, 1948, the regulations of the U. S. Department of Agriculture required that cattle coming into



the United States from Canada under the circumstances here involved be slaughtered within fourteen days after their entry into the United States. The said cattle entered the United States September 29, 1948, and by reason of said regulations it was required that they be slaughtered on or before October 13, 1948. The cattle required resting and feeding and by [20] reason thereof could not be shown for sale for two days after their arrival at Los Angeles, California, on Wednesday, October 6, 1948; the Union Stock Yards did no business on Saturday, October 9, 1948 and Tuesday, October 12, 1948, was a legal holiday in the State of California. By reason of the foregoing and in order not to be in violation of said regulations and not to incur the penalties thereof, plaintiff necessarily permitted defendant to divert said cattle as found in Finding XVII hereof and to do the other acts hereinafter found in Finding XX.

## XX.

At the time said 248 head of cattle arrived in the Union Stock Yards, Los Angeles, California, said Miller, acting for and on behalf of defendant, requested one Paul F. Hill, who was then the owner of the Southwest Commission Company, to procure bids from other meat packers for the purchase of said cattle. Said Hill procured such bids and the highest so bid for said cattle was 21c per pound live weight which fact said Hill communicated to said Miller and said Miller thereupon agreed for and on behalf of the defendant to pay and defendant did pay 21½c per pound live weight for said

cattle. Defendant transported said cattle from Union Stock Yards to the stock yards of the defendant in Los Angeles, California, where defendant slaughtered them on October 12, 13, 14 and 15, 1948.

### XXI.

The live weight of said cattle at the time they were delivered to defendant as found in Finding XX hereof was 269,620 pounds. Accordingly, in purchasing said cattle for 21½¢ per pound live weight, defendant paid \$1,348.10 more for said cattle than the best bid of other packers for the same.

### XXII.

Between the time of the conversation between said Swanson and said Miller, as found in Finding VIII hereof, and the conversation [21] between said Swanson and said Miller in Los Angeles, California, as found in Finding XVII hereof, the prices at which meat packers and wholesalers in Los Angeles, California, were able to sell dressed beef had declined and said prices at said last mentioned time were lower than they were at the time of the conversations between said Miller and said Wade as found in Findings V and VI hereof.

### XXIII.

Prior to October 4, 1948, defendant had contracts to sell to the United States Government 200,000 pounds of dressed beef. Effective as of October 4, 1948, and before the arrival of said cattle in Los Angeles, California, on October 6, 1948, the United

States Government gave defendant notice of the cancellation of said contracts.

#### XXIV

Defendant denied the existence of any contract or arrangement with plaintiff respecting said cattle as found in Finding XVII by reason of the decline in prices as found in Finding XXII hereof and defendant by reason of said decline in prices and by reason of the cancellation of the contracts with the United States Government as found in Finding XXIII hereof, refused to accept delivery of said cattle upon their said arrival at Los Angeles, California.

#### XXV.

Plaintiff performed all of the terms and conditions of the contract for the sale of said cattle to defendant on its part to be performed; and defendant by disavowing said contract and refusing to accept delivery of said cattle and refusing to pay the agreed price thereof violated its contract with plaintiff.

#### XXVI.

The live weight of said 248 head of cattle when received by defendant was 269,620 pounds. Defendant processed 148,015 pounds [22] of dressed beef from said cattle. In slaughtering cattle there is a loss of three per cent of the live weight of the cattle. Plaintiff has received the sum of \$57,850.17 for said cattle and no more. The sum due from defendant to plaintiff was \$70,357.22, of which the sum of \$57,-850.17 was paid as aforesaid leaving a balance due

from defendant to plaintiff in the sum of \$12,507.05, computed as follows:

Live weight of 248 head of cattle	
when received by defendant.....	269,620 pounds
Loss of weight due to shrinkage in	
slaughter (269,620 x .03).....	8,088.6 pounds
Live weight less shrinkage.....	261,531.4 pounds
Weight of dressed beef.....	148,015 pounds
Weight of offal.....	113,516.4 pounds
Weight of dressed beef.....	148,015 pounds
Agreed minimum price per pound	
of dressed beef.....	\$ .46
Due under agreement for dressed	
beef .....	\$ 68,086.90
Weight of offal.....	113,516.4 pounds
Agreed price per pound of offal....	\$ .02
Due under agreement for offal....	\$ 2,270.32
Due under agreement for dressed	
beef .....	\$ 68,086.90
Due under agreement for offal....	2,270.32
Total due under agreement.....	\$ 70,357.22
Received by defendant on account..	57,850.17
Balance Owing Under Agreement..	\$ 12,507.05

## XXVII.

Defendant completed slaughtering said 248 head of cattle on October 15, 1948, at which time the said sum of \$12,507.05 was due from defendant to plaintiff. [23]



### Conclusions of Law

As Conclusions of Law from the foregoing facts, the Court finds:

#### I.

Defendant, acting by and through its duly authorized President and General Manager, did, on September 8, 1948, and again on September 10, 1948, orally offer to purchase from plaintiff beef cattle to number approximately 250 head to be ready for shipment from plaintiff's ranches in British Columbia, Canada, before October 1, 1948, for a minimum purchase price delivered to defendant at Los Angeles, California, of 46c for each pound of dressed beef and 2c for each pound of offal defendant processed therefrom.

#### II.

Plaintiff accepted the said offer and performed all of the terms and conditions thereof by shipping 248 head of cattle from British Columbia, Canada, on September 29th, 1948, consigned to defendant at Los Angeles, California, and incurred expense and financial obligation in connection with such shipment. The said cattle as originally consigned by plaintiff to defendant would have been delivered to defendant at Los Angeles, California, had defendant not caused them to be delivered elsewhere.

#### III.

The contract resulting from such offer and acceptance is not invalid by reason of not having been written and defendant is estopped to assert such invalidity by reason of the fact that at no time

prior to plaintiff shipping the cattle did defendant cancel or rescind such offer, and by reason of the fact that said offer was open for acceptance by plaintiff at the time plaintiff accepted the same, and by reason of the fact that between September 24, 1948 and September [24] 27, 1948 defendant reaffirmed said offer and requested plaintiff to send the cattle to it at Los Angeles, California, then knowing that it would be necessary for plaintiff to expend money to do so, and the fact that plaintiff did expend money in transporting said cattle to defendant at Los Angeles, California. Defendant's refusal to accept said cattle at Los Angeles, California, and to pay the agreed purchase price therefor constituted a breach of the contract then existing between plaintiff and defendant.

#### IV.

Plaintiff is entitled to judgment in the sum of \$12,507.05 with interest thereon from October 15, 1948.

Judgment Is Hereby Ordered To Be Entered Accordingly.

Dated: July 25, 1950.

/s/ JAMES M. CARTER,

Judge of the United States  
District Court.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 25, 1950. [25]

In the District Court of the United States in and  
for the Southern District of California, Central  
Division

No. 10617C

CARIBOO LAND & CATTLE CO., LTD.,  
a corporation,

Plaintiff,

vs.

UNION PACKING COMPANY, a corporation,  
Defendant.

### JUDGMENT

The above entitled cause came on regularly for trial on the 20th day of June, 1950, before the above entitled Court sitting without a jury, a jury having been waived, Honorable James M. Carter, Judge presiding, Frederick W. Mahl, Jr., Esq., appearing for the plaintiff, and Benjamin W. Shipman, Esq., for the defendant; evidence both oral and documentary having been introduced and the cause submitted for decision, the Court having heretofore made and caused to be filed herein its written Findings of Fact and Conclusions of Law, and being fully advised:

Wherefore, by reason of the law and the findings of fact aforesaid, It Is Ordered, Adjudged and Decreed that palintiff do have and recover of and from defendant the sum of \$12,507.05 with interest thereon at the rate of seven per cent (7%) per annum from October 15, 1948, until the date of entry of

judgment in the sum of \$1,556.41 making a total judgment of \$14,063.46, together with plaintiff's costs and disbursements in said action amounting to the sum of \$—— [28]

Dated: July 25, 1950.

/s/ JAMES M. CARTER,

Judge of the United States  
District Court.

[Endorsed]: Filed July 25, 1950.

Judgment entered July 25, 1950. [29]

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice Is Hereby Given that Union Packing Company, a corporation, defendant above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment made and entered in the above entitled case, in Judgment Book No. 67, at Page 272, on or about the 25th day of July, 1950, and from the whole thereof.

Dated: August 24th, 1950.

/s/ BENJAMIN W. SHIPMAN,

Attorney for Defendant and Appellant, Union  
Packing Company, a corporation.

[Endorsed]: Filed August 24, 1950. [30]

In the United States District Court, Southern  
District of California, Central Division

No. 10617-C Civil

CARIBOO LAND & CATTLE CO., LTD., a Cor-  
poration,

Plaintiff,

vs.

UNION PACKING COMPANY, a Corporation,  
Defendant.

Honorable James M. Carter, Judge Presiding.

REPORTER'S TRANSCRIPT OF  
PROCEEDINGS

Los Angeles, California

June 20, 1950

Appearances:

For the Plaintiff:

FREDERICK W. MAHL, JR., ESQ.,

729 Rowan Building,

Los Angeles 13, California.

For the Defendant:

BENJAMIN W. SHIPMAN, ESQ.,

511 Pacific Mutual Building,

Los Angeles 14, California.

The Court: I have read the file and your pre-trial briefs and checked some of the authorities cited. Do you care to make an opening statement?



Mr. Mahl: Yes, if your Honor please.

I think the issues of the case are exceedingly simple. It is our position that there was a very firm contract by which the plaintiff did sell, and the defendant purchased, approximately \$70,000.00 worth of cattle. The issues are as drawn by the pleadings and by the pretrial briefs, as to the making of that contract and the question of the statute of frauds which we feel that this case comes under the exceptions. [4]

\* \* \*

JOHN L. WADE

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

\* \* \*

Direct Examination

By Mr. Mahl:

Q. Mr. Wade, you are now and were during the entire year of 1948 the president of the plaintiff corporation, is that correct? A. I was. [5]

Q. And the plaintiff is a corporation incorporated under the laws of British Columbia?

A. That is correct.

Q. The stock is entirely owned by United States citizens? A. That is correct.

Q. Mr. Ben Jaffe is now and was throughout the year 1948 the vice president of the company?

A. That is correct.

Q. And Mr. Ray Swanson, in 1948 was treasurer of the company, is that correct?

(Testimony of John L. Wade.)

A. That is correct. [6]

\* \* \*

Q. Calling your attention to the months of May or June, 1948, did you have any conversation with Mr. Adolph Miller? A. I did.

Mr. Mahl: Mr. Adolph Miller, it is stipulated, your Honor, is the president and general manager of the defendant corporation, and was in 1948.

Mr. Shipman: I accept that. [7]

\* \* \*

A. Mr. Miller and Mr. Swanson and myself at lunch discussed the feasibility of shipping all of our cattle from Canada to the United States for the American market. Mr. Miller stated he would be interested in the purchase of our type of cattle, as we explained to him what they were.

\* \* \*

And we told him that we would get in touch with him when the cattle were in condition to be killed, that is, towards the fall.

Q. (By Mr. Mahl): When did you next talk with Mr. Miller?

A. On or about September 8, 1948.

\* \* \*

Q. Will you kindly relate that conversation with Mr. Miller?

Mr. Shipman: If the conversation has to do with the making of an alleged contract, may it please the court, [8] simply for the purpose of the

(Testimony of John L. Wade.)

record may I enter the objection that it is irrelevant, immaterial and incompetent as it appears from the statements made before your Honor that it is a transaction in excess of the statutory provisions.

Mr. Mahl: I assure your Honor that this conversation has to do with the contract.

The Court: Objection overruled.

The Witness: I told Mr. Miller that Mr. Swanson had phoned me from the ranch and wanted to know if he was still interested in the purchase of the cattle that we discussed bringing down to him in May, and he said he was, and I asked him what the market was in Los Angeles and he said, "I will pay you 46 cents per pound plus 2 cents for the offal, and grade from commercial up.

Mr. Mahl: May I interrupt just a moment, Mr. Wade?

Q. 46 cents per pound of what product?

The Court: And to grade from commercial up. Does that have a meaning in the business in which you are engaged?

The Witness: Yes, sir, A is top meat, B is second, Commercial is third. So by grading from Commercial up it is a different grade than commercial utility. So by grading from commercial up each carcass would be graded commercial or B [9] or A, but the worst that it would be would be commercial.

The Court: "C" is the same as commercial?

The Witness: Well, it would be the same. We call it commercial. The statement was "commercial."



(Testimony of John L. Wade.)

Q. (By Mr. Mahl): In other words, if we understand you correctly, the beef would not be graded, according to Mr. Miller's conversation with you, below commercial grade? A. That is correct.

\* \* \*

Q. Now will you continue with the conversation at that time?

Mr. Shipman: Just a moment. Mr. Reporter, may I have the question of counsel?

(The question referred to was read by the reporter as follows:

\* \* \*

A. I told Mr. Miller that I would get in touch with Mr. Swanson and Mr. Jaffee and that I would contact him later.

Q. Was there anything else in that conversation? [10] A. I don't recall at the moment.

Q. Did you have a subsequent conversation with Mr. Miller? A. I did.

Q. When was that?

A. On or about September 10, 1948.

\* \* \*

Q. Will you tell us what was said at that conversation? What was that conversation?

A. I told Mr. Miller that my associate, Mr. Jaffe, was going up to the ranch and that I wanted to call him and confirm the conversation I had had with him on September 8th, and I had made a memorandum pad of our conversation at that September 8th meeting, so I referred to that. So I

(Testimony of John L. Wade.)

said, "Well, Adolph, let me understand you clearly. If we ship cattle to you here in Los Angeles you will pay us 46 cents plus 2 cents for the offal and this is a firm commitment?"

He said, "Yes, I can use this type of cattle, I [11] will take them."

I said, "Well, the reason I am calling you back is I want to be sure that I have this commitment before I authorize the shipment of this cattle to Los Angeles."

And he said, "That is all right, son. Send them on down."

He said, "How many will there be?"

I said, "Approximately 250 are ready to go now in this particular shipment, about 10 cars."

He said, "Well, that will be fine. You tell Swanson to send them on down."

\* \* \*

Q. After this conversation, what did you do?

A. I relayed this conversation on to Mr. Jaffe and Mr. Swanson. Then I left Los Angeles.

\* \* \*

Q. Now, Mr. Wade, your shipping point from the ranch is a town called Williams Lake, in British Columbia, is it not?      A. That is correct. [12]

\* \* \*

Q. Now did you go to Vancouver?

A. I did.

Q. And about when did you arrive there?

A. September 27, 1948.

(Testimony of John L. Wade.)

Q. And what happened in Vancouver?

A. I met Mr. Swanson about 4:00 a.m., Monday morning, September 27th, at the Georgia Hotel. We got up, had breakfast, went down to where the cattle were being fed and watered——

The Court: This is in Vancouver?

The Witness: Yes, sir.

The Court: They had been sent down to Vancouver?

The Witness: Yes, sir, from Williams Lake.

Q. Proceed.

A. They had some figures on the cost of shipping the cattle to Los Angeles, the customs, the freight, etc., and at that time we estimated it would be approximately \$10,000 that it would cost us to ship them down. And Ray had made a group of figures from this 46 cents and 2 cents for the offal, and had figured out the approximate amount that we would receive under this contract. [13]

Ray made arrangements with one of the forwarding agencies there, Byrnes & Company, one of the Frazier River stock yard people to arrange with the railroad people to ship these cattle to Los Angeles.

I told Ray, I said, "Well, we had better call Adolph and tell him they are en route, or better wire him."

He said, "I just talked to him from Williams Lake and that isn't necessary."

I told him, "We have 250 head of cattle, 10 cars. His yard may be full and his slaughterhouse may

(Testimony of John L. Wade.)

not be able to kill them the day they get there. You had better send Adolph a wire."

He said, "I will."

So I filled out a wire and wired Adolph the evening of the 27th or the morning of the 28th, that the cattle were being shipped that day, which would be on Tuesday.

Q. Did you see the wire before it was sent, Mr. Wade?            A. Yes.

\* \* \*

The Clerk: Plaintiff's Exhibit 1 for identification. [14]

\* \* \*

Q. I show you Plaintiff's Exhibit 1 for identification and ask you if that is the wire that you saw that Mr. Swanson sent to Mr. Miller.

A. This is the wire.

Mr. Mahl: We offer this in evidence as Plaintiff's Exhibit No. 1, if the court please.

The Court: Received in evidence.

The Clerk: Plaintiff's Exhibit 1 in evidence.

\* \* \*

Mr. Mahl: It is stipulated, if I understand you correctly, Mr. Shipman, that the expense to the plaintiff company for the transporting of these cattle from Vancouver to Los Angeles, including feed and watering, was the sum of [15] \$6459.47. Is that correct, Mr. Shipman?

Mr. Shipman: I will stipulate that you put in the account sales into evidence.

\* \* \*

(Testimony of John L. Wade.)

The Clerk: Yes. And this document you have just handed me will be Plaintiff's Exhibit 7. [16]

\* \* \*

The Court: I understand that Exhibit 7 is stipulated to.

Mr. Shipman: Yes, your Honor.

\* \* \*

Mr. Mahl: Will you mark this. I merely want the witness to testify that that bill was the expenses that were paid. It appears in the lower right-hand corner.

\* \* \*

The Court: No. 8, is that also one of those stipulated to?

Mr. Mahl: That is the expense for duty, etc.

The Court: Is that stipulated to also?

Mr. Shipman: No objection, your Honor.

The Court: Plaintiff's Exhibit 8 in evidence also. [17]

\* \* \*

Q. Mr. Wade, will you kindly look at plaintiff's Exhibit 7 and tell the court the amount that was expended by your company for bringing the cattle from Vancouver to Los Angeles, exclusive of duty?

\* \* \*

The Court: I take it it is the figure of \$6540.67, is that correct?

Mr. Mahl: There is a second sheet that adds \$8.30 to it, your Honor.

\* \* \*



(Testimony of John L. Wade.)

The Witness: Yes, sir.

The Court: That is what your company paid?

The Witness: Yes, sir. [18]

\* \* \*

Q. I show you Plaintiff's Exhibit 8, Mr. Wade, and ask you if you are able to tell us how much was expended by your company for United States customs in bringing these cattle into this country.

A. \$3822.

Q. So then a total of \$10,478.47 was expended in bringing these cattle to Los Angeles, is that correct?

\* \* \*

The Witness: Yes, sir.

Q. Mr. Wade, these cattle were billed from Vancouver to whom?

A. To the Union Packing Company.

Q. What is the custom in your business in connection with how cattle are billed? [19]

\* \* \*

A. If cattle are sold to a packer, or you have a contract to sell them to a packer, you ship them to the packer. If you ship them to the open market you bill them to yourself, to your company or to the owner of the cattle.

Q. And that is the custom in the cattle business, is that correct? A. That is correct.

Q. Mr. Wade, are you familiar with the regulations of the Department of Agriculture, United States Department of Agriculture, relative to requirements for slaughtering cattle brought in from foreign countries? A. I am.

Q. What are those requirements? [20]

(Testimony of John L. Wade.)

A. If you bring fat cattle into the United States under their regulations, and they are not tested, they must be slaughtered within 12 days from the time they enter the United States from the border. In other words, 12 days from the border.

Q. Were the cattle which were sold here fat cattle?  
A. Yes.

Q. What do you mean by if they were not tested they must be slaughtered in 12 days?

A. Well, I mean by that that under the regulations if the cattle are tested, t. b. test, tuberculosis tested, and they are brought in as feeder cattle to be fed and grained, and so forth, here, why then that comes under a different regulation.

Q. Were these cattle tested, as you described them?  
A. No.

\* \* \*

Q. When did these cattle leave Vancouver?

A. On Tuesday, September 28th.

Q. When did they arrive in Los Angeles? [21]

\* \* \*

Mr. Shipman: These freight bills, your Honor, apparently indicate arrival in Los Angeles on the 6th of October. [22]

\* \* \*

The Court: You know they arrived here and it must have been approximately that date?

Mr. Shipman: That is correct.

\* \* \*

(Testimony of John L. Wade.)

Cross-Examination

By Mr. Shipman: [23]

\* \* \*

Q. This meeting in 1948, where was it?

A. I believe at Levy's Grill on South Spring Street.

\* \* \*

Q. At that time were you talking about the purchase by Mr. Miller of any definite quantity of cattle?

A. Well, no, not of any definite quantity, but he was advised as to the number of cattle we would have for sale that fall.

Q. How many cattle were you going to have for sale?

A. We told him approximately a thousand head.

Q. Was there anything said at that time as to when the first cattle would be ready for shipment?

A. Well, we told him that we thought August and September, depending on the grass. In other words, some springs are earlier than others and you get grass faster, and your cattle fatten faster, so it would vary. But we told him August and September.

Q. That conversation then was more in the nature of a conversation regarding general market conditions?

A. General market conditions, but with respect to our shipping cattle to Los Angeles or selling them in Canada. [24]

\* \* \*

Q. Did you tell him that you had no other market for the cattle except Los Angeles?



(Testimony of John L. Wade.)

A. No, I didn't tell him that.

Q. Did you have a market somewhere else?

A. Oh, yes, we had a market in the United States.

Mr. Mahl: May I ask when, Mr. Shipman?

Mr. Shipman: I am speaking of the conversation, still referring to that conversation.

The Witness: Yes, there are cattle markets all over the United States, Mr. Shipman.

Q. (By Mr. Shipman): In relation to the place where you conduct your farming operations, where is the usual market?

A. Well, there is a market in Vancouver, there is a market in Kamloops, there is a market in Williams Lake, there is a market in Calgary. The cattle business is conducted the same as here in the States. We have Swift & Company and Byrnes & Company.

Q. Any market in Seattle?

A. Oh, yes, there is a cattle market in Seattle.

Q. Do you ever ship any cattle to Seattle?

A. No.

Q. Did you ever ship cattle before this to anyone or was this your first crop?

A. No, we had sold cattle prior to this.

Q. Always in Canada? [25]

A. Up to that time. The embargo hadn't been lifted, Mr. Shipman.

Q. There was an embargo at that time?

A. Oh, yes; prior to that time.

Q. When was the embargo lifted?

(Testimony of John L. Wade.)

A. I don't have the date, but it was prior to this time. All during the war there was an embargo. Just when it was lifted, I don't know.

\* \* \*

Q. Do you know whether you made any sales in Canada [26] prior to May of 1948, from that ranch of cattle?

A. Not prior to May of '48; no.

Q. So there were no sales by you from that ranch in Canada prior to this transaction that you allege took place in September of 1948?

A. Yes, there were sales I believe on the 10th of August in 1948.

Q. To Canada or the United States?

A. To Canadian packers. That is an outfit similar to Swift. It is a national meat organization.

Q. That was where?

A. The cattle were sold at the ranch.

Q. If you make sales of cattle to Los Angeles, they have to be transported by freight, don't they, to Los Angeles?

A. Yes, by freight or railroad.

Q. You didn't pay any more freight here than you would have paid had the cattle been sold to anyone else?

A. Well, no. The freight rates are established by the Commission, I presume.

Q. It is the same freight rate?

A. I presume so.

Q. Now in your conversation with Mr. Miller,

(Testimony of John L. Wade.)

the next conversation which was September 8th, that was on the telephone?

A. That is correct. [27]

Q. Where did you call him?

A. At the Union Packing Company, a Jefferson number. I have it on my pad at the office. I don't have it here.

Q. And you talked with him? A. I did.

Q. Did you tell him at that time that you had 250 head ready? A. Yes, I did.

Q. Or was that in the second telephone conversation?

A. No, I told him in the first that Mr. Swanson had called me from the ranch and told me to get in touch with Adolph and to see if he would be interested in this cattle.

Q. And you told him you had 250 head?

A. I said there is about 250 head.

Q. Did you tell him the condition of the cattle?

A. Yes, I did.

Q. Did you tell him when they would be shipped?

A. I beg your pardon?

Q. Did you tell him when they were going to be ready for shipment?

A. I told him in a few days. I didn't give him any date, no.

Q. Did he ask how soon?

A. I don't recall. He may have. I just don't recall whether he asked how soon. I think he asked how many days it [28] would take to get them to Los Angeles, how long the freight train would be

(Testimony of John L. Wade.)

getting here, but as to when I would ship I don't remember any conversation about that.

Q. But he didn't ask in that conversation how long it would take them to come to Los Angeles?

A. Yes.

Q. Did you tell him at that time?

A. I told him I didn't know but I understood about eight or ten days.

Q. In the second conversation made as to the length of time it would take for the cattle to be shipped?

A. No, I don't believe it was repeated. It was asked in one of those conversations.

Q. In the second conversation, was it said when they would be shipped? A. No.

Q. In either one of those conversations was there any statement made as to when the cattle would be shipped?

A. No. He asked me, "How soon will these cattle be ready, John?"

I said, "Certainly before the 1st of October, but I can't tell you exactly when," because Mr. Swanson was up at the ranch and I was in Los Angeles and I didn't have that information.

Q. And he offered you 46 cents a pound? [29]

A. That is correct.

Q. Irrespective of the quality of the cattle?

A. Well, he started with the commercial grade, Mr. Shipman, 46 cents commercial grade, graded up. In other words, if there were A's and B's, what we

(Testimony of John L. Wade.)

call blues and reds in Canada, well then the price in proportion would be higher.

Q. But suppose they were not commercial grade?

A. Well, I told him what type of cattle they were and Mr. Swanson had told him when he was here talking to him in May, and he just made that statement of commercial grade.

Q. When you refer to the conversation with Mr. Swanson, you mean the conversation in May of 1948?

A. Yes. He told him the quality of the cattle that we raised, the type of breeding, etc.

Q. But commercial grade is fat cattle, isn't it, finished cattle?      A. Fairly finished.

Q. But Mr. Swanson—neither you nor Mr. Swanson knew at that time whether these cattle would be fat at that time or not, did you?

A. Well, you wouldn't ship them unless they were fat cattle. If they weren't fat cattle you would ship them as feeders.

Q. But would you answer my question?

A. I would be glad to. Will you repeat it? [30]

(The question referred to was read by the reporter as follows:

("Q. But Mr. Swanson—neither you nor Mr. Swanson knew at that time whether these cattle would be fat at that time or not, did you?")

The Witness: I would say as a grower of beef that we knew it. Yes, we knew by October 1st they would be fat cattle on bunch grass.



(Testimony of John L. Wade.)

Q. (By Mr. Shipman): Mr. Wade, when was the quality of the cattle to be determined, that is, whether they were commercial or better than commercial?

A. When they were slaughtered by Mr. Miller.

Q. And Mr. Miller was to pay you no less than 46 cents a pound? A. That is correct.

Q. Irrespective then of the quality of the cattle?

A. That was the floor, the minimum, that was to be paid.

Q. Will you be good enough to answer my question? Read it again, please.

(The question referred to was read by the reporter as follows:

(Q. Irrespective then of the quality of the cattle?") [31]

The Witness: That is correct.

Q. (By Mr. Shipman): No matter how they graded or what they were?

A. As I said before, there was no other price discussed except 46 cents commercial grade and up.

Q. Then these cattle were to be fat cattle when they arrived in Los Angeles?

A. They were to be good cattle. They weren't grain-fed cattle. There is a lot of difference in different types of fat cattle.

Q. I didn't offer that suggestion. Were they to be fat cattle when they arrived in Los Angeles?

A. I presume so. Yes would be the answer. I don't get your point.



(Testimony of John L. Wade.)

Mr. Mahl: I would suggest, Mr. Wade, that you understand the question. If you don't understand it, say so.

Q. (By Mr. Shipman): If I didn't make myself clear, Mr. Wade, I will be glad to.

A. No, you didn't make yourself clear.

Mr. Shipman: Read the question again.

(The question referred to was reread by the reporter as follows:

“Q. Then these cattle were to be fat cattle when they arrived in Los Angeles?”) [32]

The Witness: Killable cattle or fat cattle. Yes, I would say yes, they were to be killable cattle, not feeder cattle.

Q. (By Mr. Shipman): Did you discuss with Mr. Miller at either of the conversations, either on September 8th or September 10th, how these cattle were to be delivered in Los Angeles?

A. Do you mean what means of transportation? Is that what you mean, Mr. Shipman?

Q. I think my question is quite clear, at least to me it is.

The Court: I do not know what you mean.

Mr. Shipman: Then I beg your pardon.

Q. How were the cattle to be shipped to Los Angeles, in what manner? A. By railroad.

Q. Was the point mentioned from which they were to be shipped by railroad?

A. No, the shortest route possible.

Q. Who was to determine that route?

(Testimony of John L. Wade.)

A. We were to determine it, I presume. He didn't say, ship them this way or that way, just get them to Los Angeles as soon as you can.

Q. So that the manner of shipping was left entirely to you? [33]

A. The matter of routing was left to us; yes.

Q. Did Mr. Miller suggest to you that possibly you would get a better deal—I withdraw that.

Did Mr. Miller suggest to you in either one of these telephone conversations in September of 1948 that you would be better off by shipping the cattle to the Union Stock Yards and not to the Union Packing Company?

A. He didn't at any time to my knowledge ask me to ship anywhere except to the Union Packing Company.

Q. But in those conversations on the 8th and 10th of September, he wanted you to ship the cattle to the Union Packing Company?

A. That is correct.

\* \* \*

Q. Now there had been some account sales introduced here——

I am a little confused on that, may it please the court. Are those in evidence or not, the account sales, that is, the Southwest Commission Company?

The Clerk: No. 7?

Mr. Shipman: No. 7 and 8.

The Court: Nos. 7 and 8 are in evidence.

Q. (By Mr. Shipman): Now, in addition to the

(Testimony of John L. Wade.)

remittance on this cattle from the Southwest Commission Company, after they were sold did you file any claim against the railroad company for the [34] condition of the cattle?

A. I never filed any.

Q. By reason of delay in transit?

A. I never filed any claim. I think the company did.

Q. As I understand it, you are here as president of the company, are you not?

A. That is correct. But you asked about me personally filing any.

Q. I didn't ask you whether you personally filed one.

A. The company filed a claim, yes.

Q. On account of the condition of the cattle?

A. Because of unloading them at the wrong yards here in Los Angeles. We made a claim. I think the claim is here.

Q. And that affected the condition of the cattle?

A. Any delay affects the condition of cattle, Mr. Shipman. [35]

\* \* \*

Mr. Mahl: Your Honor please, I have the correspondence [36] with the Southern Pacific, if your Honor is interested in that point. I can put them in evidence as to exactly the nature of the claim.

The Court: It is a defensive matter. We will see what Mr. Shipman wants to do about it. [37]

\* \* \*

(Testimony of John L. Wade.)

Q. Was the term "offal" used between you and Mr. Miller during that conversation of September 8th?      A. It was.

Q. What was said in that regard?

A. That he would pay 2 cents per pound for the offal.

\* \* \*

Q. Would you tell me what that term means?

A. Well, my interpretation of the term is that it means you have the liver, you have the heart, the brains, the sweetbreads, the hide, you have the fertilizer in the cow, you have the intestines. It is those parts. You get your dressed meat and then it is the balance of the critter.

In other words, if an animal weighs 1000 pounds and you have 500 pounds of dressed meat, you would have 500 pounds of offal.

Q. In other words, the difference between the dressed weight and the gross weight you consider to mean offal?      A. That is correct.

Q. Now, then, directing your attention to the conversation [38] of September 10th, you again called Mr. Miller?

A. I don't follow you, Mr. Shipman.

\* \* \*

The Court: You called him again on the 10th?  
The Witness: Yes, sir.

Q. (By Mr. Shipman): What was that conversation?

A. Why, I told Mr. Miller that I would be in

(Testimony of John L. Wade.)

touch with Mr. Swanson at the ranch, etc., and that Mr. Jaffe was in Los Angeles and was going up to the ranch, and I said, "Now, I want to confirm this arrangement regarding these 10 cars of cattle, the 250 head of cattle." I said, "This is a firm commitment, is it not, Adolph?"

He said, "That is right, son. You tell Swanson to send me those cattle and I will pay 46 cents and 2 cents."

I said, "Well, I just wanted to reiterate our position, Adolph, in this matter and," I said, "if that is a firm commitment I am telling Mr. Jaffe to deliver that message to Mr. Swanson to ship the cattle down."

That is what I did. [39]

Q. And that was all of the conversation?

A. Well, I just don't recall. We may have talked about other things. I just don't recall at the time.

Q. And at that time there was no mention made again as to when the cattle would be shipped?

A. The only mention was he wanted to know approximately when, and I said, "We will ship before October 1st."

Q. And no time discussed as to how long it would take to send the cattle, to actually bring the cattle from the ranch to Los Angeles?

A. I believe we discussed the matter of eight or ten days to bring them down. Whether he volunteered to that or whether I asked him, I don't recall.



(Testimony of John L. Wade.)

Q. Was there anything said at that time between you and Mr. Miller as to any letter or contract for the purchase of the cattle? [40]

\* \* \*

The Court: The answer will go out. The question was, was there anything said about a contract.

The Witness: No. A written contract you mean?

The Court: Yes.

The Witness: No, there wasn't.

Q. Now, as I understand it, Mr. Swanson was the treasurer or secretary of the company?

A. I believe he was the treasurer and general manager.

\* \* \*

Q. Did you know that Mr. Swanson was in the livestock business at one time?

A. Yes, I was acquainted with that.

Q. Did you know that he was a commission merchant at the Union Stock Yards here in Los Angeles?

A. I believe that is correct. [41]

\* \* \*

Q. Now when you were in Vancouver on the 27th of September, had the cattle arrived at Vancouver?

A. Yes, they were there when I arrived.

\* \* \*

### Redirect Examination

By Mr. Mahl:

Q. Mr. Wade, was there any faster or better way to send the cattle from Vancouver to Los Angeles than you sent them?



(Testimony of John L. Wade.)

A. Not to my knowledge. [43]

\* \* \*

Q. What was the size of your herd the first part of September of 1948?

A. I would say about 4500 head of cattle.

Q. About how many of those were ready for market in the month of September 1948?

A. I would say 500 or 600 head in that particular bunch. [44]

\* \* \*

### Recross-Examination

By Mr. Shipman:

Q. This conversation that you had on September 10, 1948, you communicated the conversation that you had with Mr. Miller to Mr. Jaffe?

A. I did.

Q. As to the arrangement of 46 cents minimum?

A. I did, yes.

Q. Plus the 2 cents for offal? A. I did.

\* \* \*

### BEN JAFFE

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows: [45]

\* \* \*

### Direct Examination

By Mr. Mahl:

Q. Mr. Jaffe, you are now and throughout the year 1948 was the vice president of the plaintiff corporation, is that correct? A. Yes.

(Testimony of Ben Jaffe.)

Q. About when was it that you went to the ranch in the month of September 1948? [46]

\* \* \*

Q. Now was there a conversation between Mr. Swanson and Mr. Miller at this time when the cattle got to Williams Lake?

A. Yes, there was.

\* \* \*

Q. The date, approximately.

A. I am not very good at remembering dates, but it was somewhere around the latter part of September.

Q. It was prior to the cattle going into Vancouver, is that right?      A. Oh, yes.

\* \* \*

Q. And you were present during the conversation?

A. Yes, I was in the phone booth with Mr. Swanson. We were squeezed in.

Q. Did you overhear the entire conversation?

A. Yes. Mr. Swanson asked me to get in the booth with him because he is a little hard of hearing, and on long distance conversations, and at various times he held the phone so we could both listen in.

Q. As a result of that were you able to hear both ends of the conversation?

A. Yes, I heard it.

Q. Will you tell us what the conversation was between Mr. Swanson and Mr. Miller?

(Testimony of Ben Jaffe.)

A. Mr. Swanson was advising Mr. Miller that he was shipping his cattle to him and Mr. Miller replied, saying that the market was a little weak in Los Angeles but nevertheless to send them on, he had a deal. And I think Mr. Swanson asked him how he wanted it consigned, and he said to send it right to the Union Packing Company. And Mr. Swanson made the notes on the way to ship it, and that was the substance of the conversation.

Q. You speak of Mr. Miller saying that he had a deal. Was anything else said in connection with that?

A. Well, no, not that I recall. There was conversation back and forth about the weather and other things. [48]

\* \* \*

Q. (By Mr. Mahl): You state, Mr. Jaffe, that Mr. Miller said he had a deal. Are you able to give us any more of the substance of that or the words of Mr. Miller's conversation? [49]

\* \* \*

The Witness: I don't recall any of the details of the conversation. During the conversation I knew that there was an arrangement made between Mr. Wade and Mr. Miller because I had notes of it that I took to Canada with me. I had the notes which I showed to Mr. Swanson, showing 46 cents and 2 cents. And to me there was nothing particularly significant about it. We were advising him the cattle were on their way, and that was it.

(Testimony of Ben Jaffe.)

The Court: The answer to the question was "No." We will strike out the rest of it. [50]

\* \* \*

Q. Thereafter the cattle were shipped from Williams Lake to Vancouver, were they not?

A. Yes, they were.

\* \* \*

Q. Now after the cattle had arrived and, as a matter of fact, after they had been slaughtered by the defendant corporation, you made a claim against the Southern Pacific Company, did you not?

A. Yes, I did.

Mr. Mahl: May this be marked for identification.

The Clerk: Plaintiff's Exhibit 10 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 10 for identification.)

Q. (By Mr. Mahl): Mr. Jaffe, I show you Plaintiff's Exhibit 10 for [51] identification, and will ask you if that is a copy of a letter that you wrote to the Southern Pacific Company. A. Yes, it is.

Q. And in what connection was that letter written?

A. In connection with freight rates. They seemingly quoted a freight rate at Williams Lake for shipment of the cattle here and that freight rate was communicated to me and when the cattle arrived and I saw the bills, why it was a different freight rate. So I wrote this letter asking for a re-

(Testimony of Ben Jaffe.)

fund. And they had one or two other charges for feeding cattle at some of the stopping points en route, and I challenged some of the costs of that particular feed, and it is all embodied in this particular letter.

The Court: Is that the only claim your company made?

The Witness: That is the only claim that our company made.

Q. (By Mr. Mahl): Did you at any time ever make any claim against the Southern Pacific or any other carrier for any loss of weight of these cattle?

A. Never.

Mr. Mahl: I will ask that this be marked plaintiff's exhibit next in order.

The Court: You mean you offer it in evidence?

Mr. Mahl: Yes. [52]

The Court: It will be received in evidence.

The Clerk: Plaintiff's Exhibit 10 in evidence.

\* \* \*

Mr. Mahl: I believe Mr. Shipman will stipulate with me, if your Honor please, that the live weight of these cattle when delivered to the Union Packing Company was 269,620 pounds.

Mr. Shipman: When delivered to them by the Southwest Commission Company.

Mr. Mahl: When they received the cattle, that was the weight.

The Court: It is a fact that they came to the Union yards from the Southwest yards, did they not?

Mr. Mahl: That is correct, your Honor.



(Testimony of Ben Jaffe.)

The Court: That will be part of the stipulation then? Mr. Shipman: That is correct.

Mr. Mahl: And also that the number of pounds of dressed beef from these cattle is 148,015 pounds.

Mr. Shipman: That is correct.

\* \* \*

Mr. Shipman: Pardon me. I didn't add these slips, but that figure of 148,000, is that the net after deducting the 3 per cent?

Mr. Mahl: Yes. That is from the records of Mr. Shipman's [54] client.

Mr. Shipman: Yes, we furnished them.

\* \* \*

The Court: How long have you been in the cattle business, Mr. Jaffe

The Witness: Not very long.

\* \* \*

### Cross-Examination

By Mr. Shipman:

Q. The clerk handed you Exhibits 5-A, 5-B and 6. You have examined Exhibits 5-A, 5-B and 6 introduced by the plaintiff for identification, have you? A. Yes.

Q. And 5-A is a copy of a letter that you wrote to Mr. Miller on November 15, 1948? A. Yes.

Q. Would you like to see this again?

A. I already looked at them.

Q. And 5-B is a statement to the Union Packing Company. Both 5-A and 5-B were prepared by you?



(Testimony of Ben Jaffe.)

A. Yes.

Q. And sent to the Union Packing Company?

A. That is correct. [55]

Q. And also Exhibit 6, a letter of November 24, 1948, was also written by you to Mr. Miller and mailed to him? A. Yes.

Q. And also the preceding two exhibits were mailed to Mr. Miller?

A. You refer to all those papers?

Q. Yes. A. I say yes to all of them.

Q. They were all mailed to Mr. Miller?

A. Yes, that is right.

Mr. Shipman: May I be permitted to introduce these as defendant's exhibits?

Mr. Mahl: No objection.

The Court: They will be received in evidence.

\* \* \*

Q. You were here when Mr. Wade gave his testimony that you filed a claim for shrinkage?

\* \* \*

A. Yes, I was here.

\* \* \*

Q. Would you say that it was done or was not done?

A. I would say it was not done because Mr. Wade was not here. I was here. He was up at the ranch. We were working quite a long distance apart and we had a claim and he had a lot of other matters to attend to, I presume, and the only claim we made was for freight. [57]

(Testimony of Ben Jaffe.)

\* \* \*

Q. You don't know of any other claim?

A. Not that I know of.

\* \* \*

### Redirect Examination

By Mr. Mahl:

Q. Mr. Jaffe, Plaintiff's Exhibit 5-B, being the statement attached to your letter of November 15, 1948, which is 5-A, gives the gross weight of the cattle, live weight, at 269,420 pounds, and then it states, "Dressed at 53½ per cent." Where did you get that figure of 53½ per cent as the dressed percentage of the beef?

A. Mr. Swanson was in touch with Mr. Miller, with the Union Packing Company, I wasn't in direct touch, and I had asked him on several occasions to have these people pay the money they owed us, and he said that he would see Mr. Miller and Mr. Miller would give him the dressed weights. And on several occasions I asked him, "How about it, Ray, where are the figures?"

"Well," he said, "here is the best I can calculate. He has them in his own records and if you are going to make out a bill we better estimate the average kill for the dressed [58] weight."

So I made the bill on that basis and felt that if there was anything wrong with it the Union Packing Company would notify me and we can make any adjustment that was necessary.

\* \* \*

(Testimony of Ben Jaffe.)

Q. Did you have any knowledge of the actual records of the Union Packing Company at the time you made this statement and put in 53½ per cent?

A. No, I had no records whatever.

\* \* \*

Q. And this was prepared upon information that Mr. Swanson had given you, is that correct?

A. That is correct.

Q. And Mr. Swanson advised you that he had talked with Mr. Miller and that was the information he had gotten from Mr. Miller, is that correct?

A. That is correct.

Q. Did you ever receive any answer to your letter to [59] Mr. Miller of November 15th, asking for payment? A. I never heard from him.

Q. Was any answer received by the company to your letter of November 24, 1948, again asking for payment?

A. I had no replies whatsoever.

The Court: Referring to Exhibit 5-B, which I believe is the statement, you show a certain number of pounds which is termed "utility," and you say "at agreed price of 42 cents per pound." I am quoting from memory.

(The document referred to was passed to the court.)

The Court: It reads as follows: "One-third dressed 'utility,' or 48,046 pounds at agreed price of 42 cents a pound, \$20,179.32." Where did you get this information, that the agreed price was 42

(Testimony of Ben Jaffe.)

cents?

The Court: Where did you get that information? The Witness: The agreed price?

The Court: Yes.

The Witness: I took the commercial price which was agreed upon and then took the utility market price, which is usually so much lower, and put that figure down figuring that if we were wrong he would get in touch with me, which he didn't.

The Court: Does "utility" generally sell for 4 cents lower than commercial? [60]

The Witness: To my knowledge, that is usually the spread.

The Court: That is how you arrived at 42 cents?

The Witness: That is right.

### Recross-Examination

\* \* \*

By Mr. Shipman:

Q. Mr. Jaffe, you read this complaint before you signed it, and that is your signature?

A. Yes, that is my signature.

Q. And you had read the complaint before you signed it? [61] A. Yes.

Q. Now how did you arrive at the sum of \$51,300.70 and no more as having been paid? Was it the Union Packing Company that paid you?

A. They didn't pay me that, no, me personally.

Q. I mean the company.

(Testimony of Ben Jaffe.)

A. I don't understand your question, Mr. Shipman.

Q. You say that you have received on account the sum of \$51,300.70.

A. What is it that you want to know?

Q. Doesn't your statement, 5-B, show a sum of money far in excess of that?

A. May I see the statement?

(The document referred to was passed to the witness.)

The Witness: I want you to know that there is a lapse of about two years from the time I sent the statement out to the time I signed the complaint. I took it for granted that the statement in the complaint is correct.

Q. (By Mr. Shipman): It was just a few days more than a year, was it not?

A. Well, a year is quite a long time.

Q. Where did you get that information?

A. Which information?

Q. The information that you state in your complaint, \$51,300.70.

A. That was prepared by the attorney. [62]

Q. You read it?

A. Yes, I read it, but I didn't have the statement in front of me to compare it with.

Q. And if you had had the statement before you, would you have said that you did not know "and has no means of ascertaining when defendant slaughtered said cattle, the aggregate number of



(Testimony of Ben Jaffe.)

pounds of dressed beef defendant processed therefrom''?

A. I wouldn't know what I would have said, Mr. Shipman.

The Court: Everybody knows that usually the lawyer draws the complaint and then gives it to his client to sign.

Mr. Shipman: We are conceding over \$6000 more than the complaint states.

The Court: That does not have much weight with me as a court. If this was a jury trial and you wanted to spend some time on that, you might get somewhere, but we will find out eventually what the claim was. You may inquire as to that.

Proceed.

Mr. Shipman: That is all.

### Redirect Examination

By Mr. Mahl:

Q. At the time this complaint was signed by you you had never seen and had no access to any of the records of the [63] Union Packing Company, did you?      A. I had not seen them, no.

\* \* \*

Mr. Mahl: I don't think there is any issue on that, and I believe the figures, Mr. Shipman—we might stipulate right now—show that there was paid on account of this shipment the sum of \$57,850.17.

Mr. Shipman: Not on account of this ship-

(Testimony of Ben Jaffe.)

ment. It was paid to the Southwest Commission Company.

Mr. Mahl: Let us put it this way: We received on account of this shipment the sum of \$57,850.17.

The Court: Let us limit the stipulation. I know what [64] Mr. Shipman's point is. Limit the stipulation to the fact that the plaintiff received, without stating from where, for these cattle \$57,850.17. Is that satisfactory?

Mr. Mahl: And no more.

\* \* \*

Mr. Mahl: I am taking that from your own records. Mr. Shipman: That is all right.

Mr. Shipman: That is all right then, those two tags.

Mr. Mahl: These two tags total \$57,850.17.

\* \* \*

The Court: As I understand the facts, and the court will draw his own conclusions from the facts, it is that the Union Packing Company paid \$57,850.17. Mr. Shipman: That is right.

The Court: That amount of money apparently went to the Southwest Commission Company.

That the plaintiff received from the Southwest Commission Company or elsewhere the same amount of money. [65] That the plaintiff got for the cattle \$57,850.17. Mr. Mahl: That is correct.

The Court: Is that right?

Mr. Shipman: Yes.

Mr. Mahl: We so stipulate, if your Honor please.

The Court: Do you so stipulate, Mr. Shipman?

Mr. Shipman: Yes, your Honor.

Mr. Mahl: Mr. Swanson, please.

RAY SWANSON

called as a witness by and on behalf of the plaintiff,  
having been first duly sworn, was examined and  
testified as follows:

\* \* \*

Direct Examination

By Mr. Mahl:

\* \* \*

Q. In the year 1948 you were connected with  
the plaintiff company, were you not?

A. I was. [66]

Q. You are not now connected with the plaintiff?

A. I am not.

\* \* \*

Q. I am not asking you for the conversation, but  
you did have a conversation with Mr. Wade rela-  
tive to a conversation Mr. Wade had had with Mr.  
Miller, is that correct?

A. That is correct. He called me on the phone.

\* \* \*

Q. After that conversation, Mr. Swanson, ap-  
proximately 250 head of cattle were brought from  
the ranch into Williams Lake, were they not?

A. That is right.

Q. And at Williams Lake you had a telephone  
conversation with Mr. Miller in Los Angeles, is  
that not correct? A. That is right.

(Testimony of Ray Swanson.)

Q. And Mr. Jaffe was present with you when you had [67] that conversation?

A. He was with me.

Q. Now will you tell us what the conversation was between you and Mr. Miller, as nearly as you can recall, Mr. Swanson?

A. It is rather hard to recall the entire conversation, but I called Adolph and, if I recall the conversation, I tried to sell the cattle there in Williams Lake——

Q. We will get to that in a moment.

The Court: What did you say over the telephone?

Q. (By Mr. Mahl): We are confining ourselves to this conversation on the phone.

A. Well, as I recall it, I asked about the market in Los Angeles and, if I recall my statement, I said to Adolph, "Well, is it all right to ship the cattle to the Union Packing Company?"

He said, "Well, the market is awfully weak down here, but try to sell them there if you can. If not, ship them." Or words to that effect. I don't recall.

\* \* \*

Q. The cattle were then shipped from Williams Lake to Vancouver, is that correct?

A. I billed them out that night to Vancouver.

Q. And you went from Williams Lake to Vancouver? A. Right.

Q. The cattle were unloaded at Vancouver for water and feeding, is that right?

A. Yes, that is correct.

(Testimony of Ray Swanson.)

Q. Now did you meet Mr. Wade in Vancouver?

A. Yes.

Q. And this was about September 27th, was it not?

A. I wouldn't know the date. He came in there one morning about 4:00 o'clock and met me.

Mr. Mahl: May I have Plaintiff's Exhibit 1?

(The document referred to was passed to counsel.)

Q. (By Mr. Mahl): I show you, Mr. Swanson, Plaintiff's Exhibit No. 1, being a telegram bearing date of September 28th. Does that telegram or the date on that telegram refresh your recollection as to when you met him?

A. That was perhaps the date.

Q. You sent that telegram, Plaintiff's Exhibit No. 1?

A. I sent that from Vancouver.

Q. At Vancouver?

A. Yes. [69]

Q. To Mr. Miller?

A. That is right.

Q. Now you also arranged for the cattle to be shipped down to the defendant, did you not?

A. That is right.

Q. And they were consigned to the Union Packing Company by you?

A. Union Packing Company by me.

Q. You consigned them to the Union Packing Company?

A. That is right.

The Court: Did you send the wire before or after the cattle were shipped?

The Witness: Before.



(Testimony of Ray Swanson.)

The Court: How long before?

The Witness: If I recall correctly, I sent that wire along in the afternoon, and I left Vancouver, I believe, that night or the next day and flew down here, and the cattle went out I think one day after I left Vancouver, as I recall.

Q. (By Mr. Mahl): That is, you left the day after that telegram was sent, the 29th, or was it the 30th?

A. I am not sure whether I left that night or the following day. I am not certain about that.

Q. But you had made full arrangements for the cattle to be shipped down to the Union Packing Company before you [70] left Vancouver, had you not? A. Right.

\* \* \*

Q. Did you have any further communication with Mr. Miller or anyone at the Union Packing Company from the time of your conversation in Williams Lake until you saw Mr. Miller in Los Angeles, did you hear from anyone connected with the Union Packing Company? A. No.

Q. How many places are there in Vancouver where cattle can be unloaded for feed and water?

\* \* \*

Q. Let me amend that and make it where they are unloaded for feed.

A. At the stockyards in Vancouver.

Q. Is that the only place you know of? [71]

A. The only one to my knowledge.

(Testimony of Ray Swanson.)

Q. What date did you arrive in Los Angeles?

A. It was either the night that this telegram was sent or the following night. That I can't recall.

\* \* \*

Q. How long was it after you arrived in Los Angeles that you saw Mr. Miller or talked with Mr. Miller for the first time?

A. Well, the next day or two after I arrived.

\* \* \*

Q. Had the cattle as yet arrived when you first talked with Mr. Miller?      A. No.

Q. And where did the first conversation you had with Mr. Miller take place?

A. Down at his office at the Union Packing Company.

Q. Why did you go to his office?

A. Because I billed the cattle down here. [72]

\* \* \*

Q. Will you tell us what the conversation was?

A. Well, I told Adolph that the cattle were on their way down, and had a general conversation. And Adolph said to me that he would have to see what he could do with the cattle when they got down and suggested that we go over and talk to Paul Hill.

Q. Did Mr. Miller say that he would or would not accept the cattle?

A. He said that he hadn't made a deal.

\* \* \*

(Testimony of Ray Swanson.)

Q. Did you, without giving the substance of it, did you telephone to Mr. Wade after that conversation?

A. Yes, I called Mr. Wade after I talked with Adolph and I told him that Adolph said that he hadn't made any definite deal.

\* \* \*

Q. You later saw Mr. Miller, did you not, at a subsequent meeting?

A. Yes, I saw him several times after that. [73]

Q. What was done in connection with these cattle? What did Mr. Miller do in connection with these cattle?

\* \* \*

A. The cattle were diverted. They were billed to the Union Packing Company, S. P. stockyards, Los Angeles, and they were diverted over to the Union Stockyards, to the Southwest Commission Company.

\* \* \*

Q. Now, as I understand it, the cattle were diverted. By whom were they diverted? They were consigned to the Union Packing Company. Now who diverted the cattle?

A. Union Packing Company. [74]

Q. And to where did they divert them?

A. Union Stock Yards, Southwest Commission Company.

\* \* \*

Q. And were you present when Mr. Miller had

(Testimony of Ray Swanson.)

any conversation with any of the officials of the Southwest Commission Company?

A. Yes, I was.

Q. The Southwest Commission Company operates out of the Union Stock Yards, do they not?

A. That is right.

Q. And their business is the purchase and sale of cattle, is it not?      A. The sale of cattle.

Q. Were you present when Mr. Miller had a conversation with Mr. Hill of the Southwest Commission Company? [75]      A. Yes, I was.

Q. What was said at that conversation?

A. Well, it is pretty hard for me to recall that conversation. It was general talk.

Q. Let me ask you this: Did or did not Mr. Miller suggest to Mr. Hill of the Southwest Commission Company that he, Mr. Hill, endeavor to get bids for these cattle, prices for them?

A. Well, they were billed to him and naturally that is what the purpose of the commission company is.

Q. Exactly.      A. To sell cattle.

Q. Did Mr. Miller ask the Southwest Commission Company to see what prices they could get for these cattle?

A. I don't recall that he did. It was natural for the commission company, that a commission company try to sell them at the best prices. That is their general business.

Q. What was the best price that the Southwest

(Testimony of Ray Swanson.)

Commission Company got for the cattle, the best bid?

A. The best bid?

Q. Yes. A. Until the sale time?

Q. Yes.

A. Well, if I recall correctly it was 21 cents. They sold for 21½ cents, didn't they? [76]

Q. I am not permitted to state to you. I am asking for your best recollection.

A. As I recall it, 21 cents.

Q. Twenty-one cents per pound?

A. From the Cudahy Packing Company.

The Court: That is live weight?

The Witness: Live weight.

Q. (By Mr. Mahl): Now what did Mr. Miller buy the cattle for?

A. Fifty cents a hundred more.

Q. Or 21½ cents? A. Right.

Q. Did you ask anyone at the Southwest Commission Company to get prices of these cattle?

Mr. Shipman: That has been asked and answered, your Honor.

The Court: Overruled.

Mr. Swanson, when did you first find out the cattle were going to be diverted from the Union Packing Company to the Southwest Commission Company?

The Witness: They were being diverted the day I arrived, if I remember correctly.

The Court: You knew at that time?

The Witness: The day I talked with Mr. Miller, the first time. I think that is the time that they



(Testimony of Ray Swanson.)

were being [77] diverted.

The Court: Did you contact the Southwest Commission Company or did somebody at Union Packing Company contact them?

The Witness: I went over with Mr. Miller to the Southwest Commission Company.

The Court: That is where you saw Mr. Hill?

The Witness: That is where I met Mr. Hill over there.

The Court: Did you know Mr. Hill before?

The Witness: Yes, I have known him for many years.

The Court: Had you known Mr. Miller before?

The Witness: Yes, for years.

The Court: You have been an old hand at this game, have you not?

The Witness: I was in the commission business down at the yards.

The Court: What happened when you got to Mr. Hill's office?

The Witness: Well, we talked about the prices of cattle and what they would do, and I was in a spot. They were coming over there on the yards to be sold and I didn't know whether—Adolph said he hadn't bought them and I had the cattle coming and I had to get rid of them.

The Court: What was said between Mr. Hill, you and Mr. Miller? Do you remember something about that conversation?

The Witness: Well, if I recall correctly, Adolph said, [78] "Well, now, as you know, Paul is one of

(Testimony of Ray Swanson.)

the best commission men in the yards, and we can see how they go in the yards here, see what they do," or words to that effect. "Paul will try to sell them in the yards." That is when I called Mr. Wade after that conversation.

The Court: Did Mr. Miller at that time say that he would better the price that Hill would get?

The Witness: No.

The Court: Did that come up later?

The Witness: That came up later I think that day. We had only a certain number of days before the cattle had to be slaughtered and that morning over at the yards, if I remember correctly it was on a Thursday morning, and I knew a lot of the buyers, I had a lot of my friends there, old friends, buyers, I had them all over there trying to get bids on the cattle, fellows like Luer Packing Company and Great Western. Fellows that I knew very well, and we weren't able—the best bid we got—and Adolph said to me, well, he made a remark, "I will pay 50 cents more than anyone else will pay for them." That was made that morning, if I remember correctly. [79]

\* \* \*

Q. (By Mr. Mahl): Mr. Swanson, if I understand you correctly, you did not see Mr. Hill until after Mr. Miller had told you he would not take the cattle, is that not correct?

A. Yes, that is when we went over to Paul Hill's office.

Q. But that was after Miller said he wouldn't

(Testimony of Ray Swanson.)

take the cattle?

A. He said that he hadn't bought them.

Q. And you made no effort in connection with these cattle until after Mr. Miller told you he hadn't bought them, is that correct?

A. That is right.

Q. Did the regulations of the Department of Agriculture requiring cattle to be slaughtered within 12 days after entry into this country play any part in your activities here in Los Angeles after the cattle arrived?

A. Certainly. The cattle didn't arrive for, I guess, 10 days after they entered the States and I only had a certain length of time before they had to be slaughtered. However, we got an extension of some time. Paul Hill got an extension out of Washington for a few days. I am not sure how many days.

Q. This was over a weekend that these discussions were being had, wasn't it? [80]

A. (Pause.)

Q. In order to assist you, Mr. Swanson, the cattle arrived on October 6th, which was a Wednesday.

A. I presume it was over the weekend then.

Q. And the following Tuesday, being October 12th, was a holiday, was it not?

A. Yes, the 12th would be a holiday. [81]

\* \* \*

Q. Mr. Swanson, after the slaughter of the cattle did you take a trip with Mr. Miller to Blythe after the time the cattle were all slaughtered?

(Testimony of Ray Swanson.)

A. That is right.

Q. Did you make any inquiry of him at that time what percentage of dressed beef came from those cattle?

A. I think I mentioned it to him. I asked him how [83] those cattle dressed out, and if I recall correctly he said around 53½ per cent.

Q. You are familiar with the statement that was sent by the plaintiff company to Mr. Miller for the balance due on these cattle, are you not?

A. The statement that was sent to him?

Q. Yes.           A. Yes.

Q. Did you assist in the preparation of that statement?           A. Yes, with Mr. Jaffe.

Q. Where did the figure of 53 per cent used in that computation on that statement come from?

A. Where did I get that figure?

Q. Yes.

A. I just said—I was talking with Adolph on that trip and I asked him about what those cattle dressed out, and he said, “Oh, I think around 53½,” if I remember correctly.

Q. And you and Mr. Jaffe used that figure in preparing that statement of November 14th, did you not?           A. That is right. [84]

\* \* \*

### Cross-Examination

By Mr. Shipman:

Q. Mr. Swanson, before you talked with Mr. Miller from Vancouver—was that talk with Mr. Miller from Vancouver or Williams Lake?

(Testimony of Ray Swanson.)

A. Williams Lake. [85]

Q. Was there more than one conversation?

A. Just one.

Q. You didn't talk about the matter to Mr. Miller at all before that? A. No, I never did.

Q. Before the shipment of the cattle to Los Angeles, did you make any efforts to sell the cattle to others around Williams Lake or Vancouver or anywhere other than Mr. Miller? A. Yes, I did.

Q. And was that after Mr. Wade had told you—that was after Mr. Jaffe came up?

A. Yes.

Q. With the message from Mr. Wade?

A. Yes.

Q. Were you able to make a sale?

A. Yes, I had them sold when I got to Williams Lake, supposed to have them sold, and when I got in there the Canadian packers backed out on the deal. I had made the deal over the telephone with them, and he bid me, if I recall correctly, he bid me 21 cents at Williams Lake, and when I got in there he wanted to cut the cattle the morning we were to weigh them up.

Q. Would you tell us what it means to cut the cattle? A. How is that?

Q. Would you explain what you mean by the term "cut the [86] cattle"?

A. He wanted to take, say, 200 of them at the 21 cents and cut 50 back at a lesser price. That is a cut-back.

Q. Did you try to sell them to anyone else?



(Testimony of Ray Swanson.)

A. Yes, I tried to sell them in Vancouver.

Q. What happened to your efforts?

A. Well, I was bid 22½ cents, I believe, in Vancouver for them from a Seattle buyer.

Q. Did Mr. Jaffe know that you were trying to make the sale in Canada?      A. In Canada?

Q. Yes.

A. Yes, he was with me at Williams Lake.

Q. When you were trying to make the sale to people other than Mr. Miller?      A. Yes.

Q. And that was at a time when Mr. Jaffe came to Williams Lake from Los Angeles with a message to you from Mr. Wade?      A. Right. [87]

\* \* \*

Q. When you came to Los Angeles had the cattle arrived yet?      A. No, they had not.

Q. You had a conversation with Mr. Miller the first or second day after your arrival?

A. Yes, I did.

Q. And at the time that you had the conversation with Mr. Miller had the cattle come into Los Angeles as yet?      A. They had not come.

Q. And what did Mr. Miller tell you in the first conversation you had with him, or at any time before the cattle came to Los Angeles, as to whether or not he would take them?

A. Well, he told me that he hadn't made a deal for the cattle, hadn't made any firm deal.

Q. In the conversation that you had with him on the telephone from Williams Lake, at which Mr.

(Testimony of Ray Swanson.)

Jaffe participated—now Mr. Jaffe was just standing there, wasn't he?      A. That is right.

Q. Or was he listening in?

A. He was standing there. [88]

Q. Was he able to hear?

Mr. Mahl: Just a moment, if the court please. That calls for a conclusion of this witness.

The Court: Not in view of the testimony that was heretofore given. Objection overruled.

You may answer, was Jaffe listening in? Did he hear part of the conversation?

The Witness: Yes, I think he could perhaps hear part of it.

The Court: Were you holding the receiver so both of you could hear?

The Witness: I had the receiver like this (indicating).

The Court: Flat against your ear or away from your ear?

The Witness: I think it was away from my ear.

Q. (By Mr. Shipman): Did Mr. Miller say anything to you that if you wanted to ship the cattle to Los Angeles it should be shipped to the Union Stock Yards?

A. I am not certain where I got the instructions to ship to the Union Packing Company at the S. P. yards, whether Mr. Jaffe brought that to me or what. I am not certain about that.

Q. Do you remember anything in that conversation with Mr. Miller as to whether or not Mr. Miller told you if you were going to ship the cattle

(Testimony of Ray Swanson.)

to ship them to the Union Stock [89] Yards and not the Union Packing Company?

The Court: Are you talking about the phone conversation now?

The Witness: As I recall that conversation—this is my recollection—I asked him about the market and then I naturally supposed that this is a deal which Wade and he had made, and I asked him, “Well,” I said, “is it all right to ship the cattle down to you?” I believe that is the way I put it. I am not certain about just what the wording was.

The Court: What else did he say?

The Witness: And he said to me, “He said the market is bad down here, try to sell them up there if you can.”

The Court: Do you remember him saying anything about he had a deal?

The Witness: No, we didn't discuss that on the telephone.

The Court: Did he say, “Send them on”?

The Witness: As I recall, he said, “If you can't sell them why send them on.”

Q. (By Mr. Shipman): Did he say that he would use them? A. Well, I just——

Q. Did he say that to you?

A. No, I don't think so.

Q. You had no other discussion as to the price? [90]

A. No.

Q. Now you had this conversation with Mr. Mil-

(Testimony of Ray Swanson.)

ler from Williams Lake after you made the attempts to sell the cattle in Canada?

A. After I tried to sell them at Williams Lake.

Q. At Williams Lake? A. Yes.

Q. Now will you tell us what happened when you came to Los Angeles?

A. I went down to Mr. Miller's office, told him that the cattle were on their way down here, and they should arrive in about a week or 10 days, a week or seven or eight days, that is the time when Adolph told me, and at the time I mentioned about slaughtering the cattle they had to be slaughtered in a certain length of time, all of which he knew, of course. And he said—well, I told him what Mr. Wade and Mr. Jaffe had told me the deal was for the cattle and he told me he hadn't made that kind of a deal.

Q. Did you ask him to divert the cattle to the Union Stock Yards?

A. No, I don't think I did.

Q. How was it that the cattle were diverted to Mr. Hill or to the Union Stock Yards?

A. That is when Mr. Miller asked me, he said he will go over and talk to Paul Hill, Southwest Commission Company. [91] We went and talked with Paul about the market conditions and Paul seemed to think that that was—he had a lot of bidders and the market was weak, that that might be the best place to sell them. Well, I didn't dispute it.

(Testimony of Ray Swanson.)

Q. And you were in the commission business at one time?      A. Yes, sir.

Q. At the Union Stock Yards?

A. Yes, sir.

Q. For what period of time?

A. A little over a year.

Q. During what period of time?

A. What years? [92]

Q. Yes.

A. I believe that was in '38 and '39.

Q. Do you know whether the signature of the person to whom merchandise is shipped is necessary to make a diversion?

A. I thought it would be.

Q. You knew that the cattle were being diverted to the Union Stock Yards?      A. Yes.

Q. So that Mr. Hill could sell them?

A. Yes.

Q. Did you discuss the terms of handling by the Southwest Commission Company of the deal for you?      A. No, I didn't. [93]

\* \* \*

Q. You knew then that he was going to sell the merchandise, the cattle?      A. Yes.

Q. Did you keep in touch with Mr. Hill after the arrival of the cattle in Los Angeles and until they were sold?      A. Yes.

Q. When Mr. Hill told you from time to time what offers he received for them—

A. Yes.



(Testimony of Ray Swanson.)

Q. ———did he say to you whether it was wise or unwise to sell at those offers?           A. Yes.

Q. Did he by himself or upon your instructions obtain an extension of time for the sale and slaughter of the cattle?

A. I believe we talked about it and he proceeded to get the extension out of Washington.

Q. And when you say that we talked about it, whom do you mean?           A. Mr. Hill and myself.

Q. After Mr. Miller refused to take the cattle from you, did you have any other plans to dispose of the cattle except through the stockyards? [94]

A. That is the only outlet.

Mr. Shipman: That is all.

### Redirect Examination

By Mr. Mahl:

Q. Mr. Swanson, did you ever talk with Mr. Hill about these cattle except when you went to the Union Stock Yards with Mr. Miller?

A. The first time I talked to him I went with Mr. Miller.

Q. Was Mr. Miller with you on the other occasions that you talked with Mr. Hill?

A. Well, not always. I was in the yards every day while those cattle were here.

\* \* \*

Q. How long have you known Mr. Miller?

A. I don't believe I said 20 years.

Q. How long?

(Testimony of Ray Swanson.)

A. I have known Mr. Miller since—well, I guess that is right, in the early 30s.

Q. Now the Union Packing Company is not a commission [95] house, is it? A. No.

Q. In other words, they are not in the commission business? A. No.

Q. They don't buy and sell cattle, they buy cattle and slaughter it, isn't that correct?

A. The Union Packing Company buys and slaughters.

\* \* \*

Q. Mr. Swanson, did you know when you attempted to sell cattle in Williams Lake that there were other cattle available on the ranch ready for sale?

A. You mean ready for sale at that time?

Q. Or very shortly thereafter.

A. Within another 30 days.

Q. Were there as many as 250 head within another 30 days? A. I think so. [96]

### Recross-Examination

By Mr. Shipman:

Q. Mr. Swanson, when you were attempting to sell the cattle in Canada did you show any of the cattle to buyers? A. Oh, yes.

Q. And you didn't show them the cattle that were going to be ready in 30 days, did you?

A. I showed the cattle I had there.

(Testimony of Ray Swanson.)

Q. And that was the same cattle you shipped to Los Angeles?      A. That is right.

\* \* \*

ADOLPH MILLER

called as a witness by and on behalf of the plaintiff under Rule 43(b), having been first duly sworn, was examined and testified as follows: [97]

\* \* \*

Cross-Examination

By Mr. Mahl:

Q. Mr. Miller, you are and were throughout the year 1948 the president and general manager of the Union Packing Company?

A. That is right.

Q. Do you recall a conversation that you had with Mr. Wade, a telephone conversation in the month of September, 1948?      A. Yes.

Q. Are you able to place that date with any degree of certainty?      A. No, I am not.

Q. During that conversation the purchase of cattle by you from the plaintiff was discussed, was it not?

A. Not the purchase, the handling of cattle.

Q. The what?      A. The handling.

Q. Not the purchase of cattle?      A. No.

Q. Mr. Miller, your deposition was taken in this case, was it not?      A. That is right.

Q. I hand you a copy of it. Will you look on page 7, line 3, of your deposition? [98]

A. (Examining deposition.)

(Testimony of Adolph Miller.)

Q. I will ask you if this question was asked and if your answer was not as I give it—I am reading from the top of page 7:

“Q. You were here in Los Angeles at the time, were you not?

“A. Yes—what our market conditions were, and he described somewhat the cattle that they expect to have out of their ranch, and wanted to know whether we could handle it. We handle all grades of cattle. So I told him we possibly could.”

That is your testimony?

A. That is correct.

Q. Was there any other conversation at that time, that you recall?

A. The only thing that I can recall is as to market conditions.

Q. I am speaking now of what you and Mr. Wade said on the telephone at that telephone conversation. What else, if anything, can you recall?

A. Mr. Wade asked me what our market conditions were, and I described them as closely as I could as to what they were on that particular day.

Q. That was all that was said? [99]

A. That is all that was said.

Q. He asked you what the market conditions were and you told him?

A. That is right.

Q. Nothing else was said?

A. Not that I can remember.

Q. Did you have any other telephone conversa-

(Testimony of Adolph Miller.)

tion with Mr. Wade prior to the time that these cattle arrived in Los Angeles?

A. I think he called me a second time.

Q. About how long after the first time?

A. I couldn't recollect for certain, but I imagine it was just a few days.

Q. And that was a telephone conversation?

A. That is right.

Q. What was said?

A. Still the same thing, and he wanted to know about how these cattle were selling, and I expressed as to what they were selling in our market here.

Q. What did you say they were selling in your market, if you remember?

A. Well, I told him what the live market was and I also told him about what we were getting for beef.

Q. Did you tell him in figures per pound?

A. I don't exactly remember, but I might have.

Q. Was there any other conversation?

A. No other conversation.

Q. Nothing else said at that conversation?

A. Not that I can remember.

Q. You have related to us fully what was said at those two conversations?      A. That is right.

\* \* \*

Q. Mr. Miller, you received the telegram sent by Mr. Swanson, which is Plaintiff's Exhibit No. 1—I show you a photostat of it—

May I have the original?



(Testimony of Adolph Miller.)

(The document referred to was passed to counsel.)

Q. (By Mr. Mahl): I show you Plaintiff's Exhibit No. 1 and ask you if you received that telegram?

A. Yes, I did.

Q. You received it shortly after the date it bears, September 28? A. I imagine so.

Q. What did you do when you received that telegram?

A. I immediately tried to locate Mr. Swanson at the place where the telegram was sent. [101]

Q. And that is Vancouver?

A. Vancouver, that is right.

Q. Where in Vancouver did you try to reach Mr. Swanson?

A. Well, I asked operator to try to get him in the stockyards there, if there is any stockyards.

Q. Did you try any of the hotels?

A. I just instructed operator to try to locate Mr. Swanson for me in British Columbia.

Q. Vancouver? A. Vancouver.

Q. And you didn't get Mr. Swanson with those instructions to the operator, did you?

A. No, I didn't.

Q. Did you make any effort to phone to the ranch? A. No, I didn't.

Q. Did you make any effort to reach Mr. Swanson at Williams Lake? A. No.

Q. So that all you did was ask the operator to

(Testimony of Adolph Miller.)

try to get Mr. Swanson at the stockyards in Vancouver?      A. That is right.

Q. I misworded my question. You did not try to get either Mr. Wade or Mr. Jaffe at the ranch?

A. I didn't know those two people. [102]

Q. The question is, if you made an effort to get either of them.      A. No, I didn't.

Q. Now the cattle were billed to you at the Union Packing Company, were they not?

A. Originally; yes, sir.

Q. And you diverted them, did you not?

A. They had to be diverted by——

Q. Just a moment. I am asking if you diverted them.      A. I did, yes.

Q. Did you mean that you did personally or your office?      A. No, I had a man divert them.

Q. Is there a Mr. Mel Hart connected with your organization?      A. Yes.

Q. Are you familiar with his handwriting?

A. Yes.

Q. I will ask you if this is in his handwriting.

The Court: Have you marked that for identification?

Mr. Mahl: I was going to put it right in evidence.

The Witness (Examining document): That is right.

The Clerk: Plaintiff's Exhibit 11.

(The document referred to was marked Plaintiff's Exhibit No. 11 for identification.) [103]

(Testimony of Adolph Miller.)

Q. (By Mr. Mahl): This is his handwriting, is it not?

A. That is his handwriting.

Q. And this is the diversion order to which you referred?

A. That is right.

Mr. Mahl: We offer it in evidence as the next exhibit in order, please.

The Clerk: Plaintiff's Exhibit No. 11.

(The document previously marked Plaintiff's Exhibit No. 11 for identification was received in evidence.)

Q. Now you knew at the time these cattle arrived here of the regulation that they must be slaughtered under the regulations of the Department of Agriculture within a few days, did you not?

A. Yes, sir.

\* \* \*

Q. You had a conversation with Mr. Hill in regard to these cattle, did you not? [104]

A. In the presence of Mr. Swanson.

\* \* \*

Q. Will you turn to page 32 of your deposition, please, Mr. Miller. I ask if this is not the testimony you gave at the time of your deposition—page 32, line 4:

“Q. You had this conversation with Mr. Hill?

“A. That's right.

“Q. Was anyone else present?

“A. No.

(Testimony of Adolph Miller.)

“Q. What was said at that conversation?

“A. He told me that he had some awful mean bids on the cattle from different people.

“Q. Bids?

“A. Yes. Offers. And wanted to know whether I can handle the cattle. I told him to try to get as much as he can out of them, and if he can't, why then I will try to buy them from him in order to help out Mr. Swanson. That is what I was mainly interested in.” [105]

\* \* \*

Q. May I shorten it this way: Isn't it a fact that the highest bid he was able to get was \$21 a hundred from the Cudahy Packing Company?

A. That is right.

Q. And you paid \$21.50 a hundred, didn't you, for these cattle?

A. That is right.

Q. Had you ever done any business before with the Cariboo Land & Cattle Company?

A. I have not. [106]

Q. You didn't know them before this?

A. No.

The Court: How did you happen to bid 21½ cents when Cudahy bid 21?

The Witness: Well, the whole transaction with Mr. Swanson, as far as I was concerned, was merely a friendly proposition. I have done business with Mr. Swanson in the past and we have discussed about these cattle out of Canada, and he wanted to know what our conditions were, and I kept in close touch with him right along even before he

(Testimony of Adolph Miller.)

ever got associated with this cattle company, and we expressed our opinions. The only reason that I decided about having him ship the cattle—in fact, he wanted to get the best price that he can get out of the cattle, so I told him the condition of the market, that the best thing for him to do is to sell the cattle on the open market and then he will know that he is getting the best price available for them. As far as I was concerned, 250 cattle to us is one day's slaughter. But I knew if I would have received those cattle at our plant, slaughtered them and paid them their value, I would be the fall guy. He wouldn't think that he got every cent that he was entitled to for these cattle. So in a friendly manner I suggested to him, "You take those cattle into the stockyards and I will try to see that they don't try to steal them from me." That is the reason he diverted those cattle and the reason I [107] signed the diversion on them. The cattle had to be released by the Union Packing Company before they can go into any other place but the Union Packing Company. [108]

\* \* \*

Q. You knew that these cattle came from the corporation, didn't you?

A. I knew that they come from Ray Swanson. I knew Ray Swanson.

Q. Did you have any knowledge at this time of what interest Ray Swanson had personally in these cattle? [110]

A. I did not.



(Testimony of Adolph Miller.)

Q. As far as you went then you didn't know he had any interest in them?

A. Oh, yes, I knew—he told me that he was interested in this particular cattle company.

Q. He didn't tell you to what extent?

A. No, he didn't.

Q. Now isn't it a fact, Mr. Miller, that this 50 cents additional that you paid over the highest bid of the Cudahy Company cost you over \$1300? Isn't that a fact?

A. Yes, I imagine so. It is more than \$1500 because I think the cattle weighed somewhere in the neighborhood of 263,000 pounds, somewhere in that neighborhood.

Q. It cost you over that?

A. That is right.

\* \* \*

Mr. Mahl: For the purpose of the record, Mr. Shipman, [111] Plaintiff's Exhibit 12 is the kill sheets which were furnished me by you, that is, the kill sheets of the Union Packing Company, and I assume that you will stipulate that these are the kill sheets?

Mr. Shipman: You asked for them and I gave them to you.

Q. I show you, Mr. Miller, Plaintiff's Exhibit 12. These are the records of the Union Packing Company, are they not? A. They are. [112]

\* \* \*

Q. Mr. Miller, as I understand the bookkeeping arrangement at your company, the cattle are slaugh-

(Testimony of Adolph Miller.)

tered and the kill sheet is prepared, that is, Plaintiff's Exhibit No. 12, is that correct?

A. That is done right on the kill floor.

Q. In other words, right down on the killing floor you prepare these kill records?

A. Well, each individual beef is weighed and the weights are written down on the killing sheet.

Q. And is this a copy of the kill sheet?

A. That is right.

Q. I am referring to Exhibit 12. A. Yes.

Q. What happens to these kill sheets in the matter of your bookkeeping?

A. Well, they go up to the same office and they are calculated, they are added up and the total weight of that particular day's kill goes into the column of another sheet that we make out.

Q. That is Plaintiff's Exhibits 2-A, B, C and D, is it not, these documents here?

A. That is right. [113]

Q. So that after the kill sheet is made up, that is, Plaintiff's Exhibit 12, that is made up right on the floor where the killing is being done?

A. These sheets?

Q. That is the kill sheets?

A. That is right.

Q. The record is then taken upstairs to your office department? A. That is right.

Q. And Plaintiff's Exhibit 2-A to 2-D, inclusive, is made up, is that correct? A. They add up.

Q. I mean, I am just asking the way you keep those records. Am I correct in that?

(Testimony of Adolph Miller.)

A. That is right.

Q. How soon after the kill sheet is made up by those records, Plaintiff's Exhibits 2-A to 2-D, inclusive, made up?

A. Well, sometimes they are made up the same day as the slaughter, and sometimes they don't make them up until the next day.

Q. They are made up by different people than do the slaughter, is that correct?

A. That is right.

Mr. Mahl: These Exhibits 2-A to 2-D, inclusive, your Honor, have a lot of information with which we are not concerned [114] in this case, and I have prepared a digest of the information from those sheets, with the exception of one column, as to the dressed weight, all off of these sheets. It might be easier if we would refer to this rather than these sheets which have a lot of items on them which are not material.

The Court: Do you want this marked?

Mr. Mahl: I would like to have it marked for identification. I don't think it is properly in evidence.

The Court: We will mark it 2-E for identification.

(The document referred to was marked Plaintiff's Exhibit No. 2-E for identification.)

Q. (By Mr. Mahl): Now, in view of what you have just testified, Mr. Miller, would you kindly look at your kill sheets, Plaintiff's Exhibit No. 12, and am I correct that on none of those kill sheets

(Testimony of Adolph Miller.)

having to do with the cattle in this case is there any grading which is down at the bottom?

A. That is on these sheets here?

Q. That is right.

A. That is right.

Q. None of these sheets have any grading, is that correct?

A. That is right.

Q. Well, now, if you will turn to Plaintiff's Exhibits 2-A to 2-D, more particularly to the paper which is taken from there, the beef is graded, isn't it? [115]

A. As to our own grade.

Q. Just answer yes or no. It is graded there, isn't it.

A. Yes.

Q. And this Exhibit 2-A to 2-D is the one that is made up upstairs off the kill floor and there is this grading on those sheets?

A. That is right.

Q. Will you kindly explain to us how the people making up Plaintiff's Exhibit 2-A to 2-D, inclusive, knew what those grades were.

A. The salesman usually goes through the beef the next morning and decides as to what grade they would go in unless they are of good grade or better, then we have them—in other words, if we have any cattle slaughtered and we think that there is any chance of them grading A, we have the man from the Department, the grader from the Department of Agriculture, come in and he grades them, puts roller stamp on these cattle, but that would only apply to our A grade or better.

Q. Isn't it your practice to enter on your kill

(Testimony of Adolph Miller.)

sheets, Plaintiff's Exhibit 12, right down in the killing floor the grades of beef? A. No, sir.

Q. After these beef are slaughtered the carcasses are [116] simply put in a room for aging, aren't they? A. Yes, sir.

Q. What indicia do you have on those carcasses that show from what lot they came?

A. There is tags on each individual side of beef.

Q. In other words, you can trace back?

A. Oh, yes.

Q. Those carcasses hanging in your curing room can be traced right back to the purchaser by the indicia that you put on them?

Mr. Shipman: Do you understand the question?

Q. (By Mr. Mahl): Does the particular carcass hanging here in this room after it is slaughtered and it is aging, is there some mark on that carcass that will show from whom you bought it?

A. We have the lot number on the carcass and even the number of the beef—that goes down by numbers. It is right on the tag. And as the salesman goes in the next day, or if they are better grade of cattle the grader from the Department of Agriculture walks in.

Q. Who puts the grading on the cattle shown on Plaintiff's Exhibit 2-A to 2-D, inclusive?

A. Our salesman.

Q. Where does he get his information from?

A. From looking at the cattle. [117]

Q. Now each head of cattle, Mr. Miller, will have



(Testimony of Adolph Miller.)

a different percentage of dressed beef from it than will other head, isn't that correct?

A. That is right.

Q. In other words, some cattle dress high, the percentage of dressed beef, and others dress low, is that right?

A. Yes, sir.

Q. It would be rather unusual, would it not, Mr. Miller, if 243 head would all dress within one hundredth of a per cent of each one, wouldn't it?

A. It would, yes.

Q. Well, then, will you kindly explain why it is that on your records these 243 head of beef all show that they dressed out exactly the same percentage of dressed beef as to weight to the one hundredth of a per cent? Will you explain that to us?

A. Yes, sir. This beef is added up off of the killing sheet and the total weight marked on the killing sheet and then copied into this main sheet and then they added up the total of the dressed weight and then they take the total of the live weight—we don't take each individual beef, we take the whole lot of cattle.

Q. Mr. Miller, will you look at Plaintiff's Exhibit 2-A. It is the top sheet there. And then look at Lot No. 39.

A. Yes. [118]

Q. That is beef with which we are here concerned, is it not?

A. That is right.

Q. There is 63 head in that lot?

A. That is right.

Q. Under the column of "Yield" you have got—

A. 55.02.

(Testimony of Adolph Miller.)

Q. —55.02? A. That is right.

Q. Now that is the average of those 63 head, is it not? A. That is right.

Q. Now will you look down at Lot 43?

A. That is right.

Q. That has to do with 60 head of these cattle, doesn't it? A. That is right.

Q. And that also comes out 55.02.

A. That is right.

Q. For those 60 head? A. That is right.

Q. And if you will look at Lot 54, that consists of 60 head of cattle? A. That is right.

Q. That also comes out 55.02?

A. That is right. [119]

Q. Will you kindly explain how that is, Mr. Miller? Before you answer, are there any other lots here other than the lots of the beef with which we are concerned that average out exactly the same? Will you look at this and tell us?

A. Not unless they are out of the same cattle.

Here is the way we handle our yield on these cattle, figure the yields on them. As you can readily see, there are some parts of these cattle that were killed on the 12th, and then on the 13th, 14th and 15th. Well, the weight is added into our lot sheet and then they are added up, the total dressed weight as against the total live weight, and then they figure what the yield on those cattle is for the total number of cattle in that particular lot.

Q. In that particular lot?

A. That is right.

(Testimony of Adolph Miller.)

Q. My question is, why are every one of these lots the same, with the one exception of the six head, which are Lots 39, 43, 54 and 60, why are they all 55.02 per cent yield?

A. Because we don't figure these cattle in each day. We may take an approximate yield on them but we wait until the entire lot is slaughtered and then add up the total of the dressed weight and figure them into the total of the live weight.

Q. Now will you look at Exhibit 2-B, Lots 47, 46, 48 and 49 are bought from Bassett. Those are heifers. They were [120] all slaughtered on the 13th of October. They were all bought from Basset.

A. Yes.

Q. The dressed weight of the first lot yielded 55.92 per cent, of Lot 46, 53.05 per cent, Lot 48, 56.06 per cent, of Lot 49, 59.86 per cent. Those each have a different yield, have they not?

A. That is right.

Q. Why is that?

A. Because they are all different lots of cattle. And Bassett is our own feed lot. We take those cattle out of our own feed lots and they come out of different lots of cattle and we figure each individual lot separately.

Q. Then you did treat, so far as your records go, these cattle differently than you treated other cattle?

A. No, I did not. If I only had 63 cattle in that lot, why we would have figured the 63 cattle. But if there was 240-some cattle then we add up the

(Testimony of Adolph Miller.)

total number of the cattle, take the dressed weight and the live weight, and then derive our yield on them.

Q. Will you look on Exhibit 2-D, dated October 15. There you have a lot from "Yards," Lot No. 62, which yielded 53.99 per cent.

A. Lot 62?

Q. That is right. And you have on that same day Lot [121] 56 from "Yards" and that yield is a different yield, 56.49 per cent.

A. That is right.

Q. Why weren't they treated the same?

A. Because they were two different lots of cattle.

Q. We are dealing here with five lots of cattle, are we not?

A. No, you don't. You deal with one lot of cattle. They were all bought at the same price, at the same time.

Q. Now of course in order to figure your cost in the cost column on Plaintiff's Exhibit 2-A to 2-D, that cost is naturally controlled by the percentage of yield, is it not?

A. That is right.

Q. So that you would naturally have the same dressed weight cost for all of these cattle with the exception of Lot 37, which is separate, is that right?

A. Cattle coming out of our own feed lots, we don't always take them out on the live cost basis. We put a dressed cost on them and derive as to the live value of them from the dressed value.

Q. Mr. Miller, referring to Plaintiff's Exhibit

(Testimony of Adolph Miller.)

2-A to 2-D inclusive, the cattle coming from the plaintiff in this action are Lots 37, 39, 43, 54 and 60, as shown on that exhibit, is that not right?

A. Is that on this? [122]

Q. Yes. A. 37?

Q. 37? A. Yes.

Q. 39? A. That is right.

Q. 43? A. Yes.

Q. 54 and 60? A. 54 and 60; yes.

Q. That adds up to 248 head of cattle with which we are concerned here, is that right?

A. That is right.

Q. Now, Mr. Miller, between the time of the conversation that you had with Mr. Swanson at Williams Lake and the arrival of these cattle in Los Angeles, the market had dropped off, hadn't it?

A. I imagine it had, yes. [123]

\* \* \*

Mr. Mahl: We might shorten this, Mr. Shipman, if you will stipulate with me that the Union Packing Company had government contract or contracts for the supplying of beef and that those government contracts were canceled in the manner and at the time shown on Plaintiff's Exhibit 13 for identification.

Mr. Shipman: Yes, on the date it shows, the 4th of October.

Mr. Mahl: The date is October 4th on all of these cancellations. They show dates of delivery starting October 1-10, and then the figure 15. They



(Testimony of Adolph Miller.)

are all the same. Each of the five is a cancellation for 40,000 pounds of beef, making a total of 200,000 pounds of beef.

Is that stipulated to?

Mr. Shipman: Yes.

Now let me ask you this: What is the purpose of that?

Mr. Mahl: I think it explains—these cattle left Vancouver on the 28th or 29th and arrived here on the 6th of October—I feel that it explains why the contract was not recognized. Here is 148,000 pounds of beef that he gets from the cattle which we sent, and here is a government contract [124] for 200,000 pounds of beef. That is the purpose of it.

We will offer Plaintiff's Exhibit 13 for identification in evidence.

The Court: It will be received in evidence.

(The documents previously marked Plaintiff's Exhibit No. 13 for identification were received in evidence.)

\* \* \*

Q. Mr. Miller, you received the letter dated November 15th from Mr. Jaffe, together with a statement attached thereto, being Plaintiff's Exhibit 5-A and 5-B, did you not? [125]

Mr. Shipman: We will stipulate to that.

Mr. Mahl: Will you also stipulate, counsel, that he received the letter of November 24th?

Mr. Shipman: So stipulated.

Mr. Mahl: Which is Plaintiff's Exhibit 6.

(Testimony of Adolph Miller.)

Mr. Shipman: So stipulated.

Mr. Mahl: Is it also stipulated that he made no reply to them at all?

Mr. Shipman: So stipulated. [126]

\* \* \*

Mr. Mahl: Your Honor please, Mr. Swanson has advised me that he did not understand the question that I asked him. I talked with Mr. Swanson during the recess only with Mr. Shipman. I would like to put Mr. Swanson back on the stand.

RAY SWANSON

recalled as a witness by and on behalf of the plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination

By Mr. Mahl:

Q. I believe, Mr. Swanson, you said you did not understand a question of mine and I will re-ask the question.

Q. Did you after the statement of November 15, 1948, was sent to Mr. Miller by Mr. Jaffe, have a conversation with Mr. Miller relative to his paying the bill? Do you understand my question?

A. Yes.

I met Mr. Miller down at the stockyards one day up on the catwalk shortly after the time the bill was made out and I made the remark to him that I was in a tough spot on this deal with Wade and Jaffe because of the way that deal went, and Adolph made a remark back to me, he said, "Well, I will see you

(Testimony of Ray Swanson.)

in two or three days.” And that was all that was said. [127]

\* \* \*

### Cross-Examination

By Mr. Shipman:

Q. Now when you speak of a statement you mean this statement?

A. (Examining document): Yes, this is the one.

Q. And I am referring now to Plaintiff's Exhibit 5-B.

Now, Mr. Swanson, you received settlement from the Southwest Commission Company?

A. For the cattle?

Q. For the cattle.           A. Yes, I did.

Q. And that was paid by the Southwest Commission Company to the Cariboo Company?

A. Cariboo Land & Cattle Company.

Q. Cariboo Land & Cattle Company.

A. Yes.

Q. No payments of any kind have been made here by the [128] Union Packing Company, were there? Were any payments made by the Union Packing Company?

A. No, it all came from the Southwest Commission Company.

### Redirect Examination

By Mr. Mahl:

Q. The Union Packing Company paid this money to the Southwest Commission Company that was in turn paid to the plaintiff, isn't that correct?

(Testimony of Ray Swanson.)

A. They would have to. [129]

\* \* \*

The Court: Before you make your motion, let me inquire of you or Mr. Mahl what is meant by some of this material on Exhibits 2-A to 2-D inclusive. I notice after the lot number there is a column "AA," "A," "B," "C," and "D."

\* \* \*

Mr. Mahl: I think I could answer his Honor and I think you will agree with me.

Column "AA," if your Honor please, is supposed to be for choice. However, the figures appearing there, Mr. Miller states, do not indicate choice but rather possible selling price.

However, the figures in columns "A" to "D" indicate the quality of the dressed beef, A being good, B being commercial, C being utility, D being cutter and E being canner. [130]

\* \* \*

Mr. Shipman: I should like to make a motion at this time, may it please the court, for nonsuit on the ground that the plaintiff has failed to establish a prima facie case or a case which is not barred by the statute of frauds.

The Court: Well, you have two grounds, that no prima facie case has been made and, if I understand you right, even if some contract has been made out, the motion is based upon the ground that the statute of frauds bars the action. [133]

\* \* \*

The Court: Your point is that that is a stronger

case in that there was an element of fraud?

Mr. Shipman: Yes.

The Court: But under the rule of these cases is fraud necessary? The whole doctrine of promissory estoppel rests upon what is common sense, that where somebody has made a promise and the other person relies on it, and changes his position he should not therefore, in equity and in good conscience, be allowed to change the position he has taken to the detriment of the other party. And this case, it seems to me, comes within that category.

Now having in mind that all intendments are in favor of plaintiff's position at this time, it seems to me that in view of the testimony and of the witnesses that have been given in evidence here, that when they shipped these cattle [135] down at the expense of several thousand dollars, certainly there was reliance on the words of the defendant which would take this case out of the statute of frauds, at least for the purpose of the motion.

Mr. Shipman: Except, your Honor, that the plaintiff's own conduct shows that there was no such contract for the reason that he goes ahead, and Mr. Swanson has so testified——

The Court: You mean he tried to sell the cattle?

Mr. Shipman: Yes, the identical cattle in the Canadian market.

The Court: That is a matter that you might argue when the case is concluded, but from the standpoint of what is the plaintiff's strongest position, you have Mr. Miller making an offer. It is a continuing offer until it is revoked. Certainly it



would continue for a reasonable time. Then according to the witnesses for the plaintiff, when they talked to him on the telephone he said to send the cattle down. That would probably constitute an acceptance. And when the cattle started on their way and expenses were incurred, there was reliance which would prevent him from changing his position.

I am going to deny the motion for a nonsuit at this time, without prejudice to raising any points you want to at the conclusion of the trial. [136]

\* \* \*

PAUL F. HILL

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Paul F. Hill.

Direct Examination

By Mr. Shipman:

Q. What is your business or occupation, Mr. Hill?      A. Livestock.

Q. Are you a commission merchant?

A. I am.

Q. Where is your place of business?

A. At the Los Angeles Union Stock Yards.

Q. How long have you been in business?

A. At the Los Angeles yards?

Q. Yes, in the livestock business.

A. I have been in the livestock business over 40 years.

(Testimony of Paul F. Hill.)

Q And at the stockyards?

A. Since 1922, in November.

Q. Do you know Mr. Miller? A. I do.

Q. Do you know Mr. Swanson? A. I do.

Q. Do you know Mr. Wade or Mr. Jaffe?

A. I have met the gentlemen today. [140]

Q. You knew Mr. Swanson and Mr. Miller in 1948, did you? A. I did.

Q. Did you have an occasion to have any conversations with them in regard to cattle shipped from Canada by the Cariboo Land & Cattle Company? A. I did.

Q. Who was the conversation with?

A. Mr. Miller and Mr. Swanson.

Q. Where was the conversation?

A. In my office at the Union Stock Yards.

Q. Can you tell us when that conversation was held? A. No, I cannot.

Q. At the time of this conversation were the cattle in the yards as yet or not, or were the cattle in Los Angeles? A. They were not.

Q. This conversation was before the time the cattle arrived? A. That is true.

The Court: How long before they arrived?

The Witness: I couldn't definitely state that, your Honor. It was several days.

Q. (By Mr. Shipman): Can you tell us what conversation you had with them?

A. Well, they came into my office and said that Ray [141] had some cattle that he had loaded out of Canada that were consigned to the Union Packing

(Testimony of Paul F. Hill.)

Company and that he had decided that he wanted to try the open market and that they wanted to divert the cattle and let me see what I could do with them on the market.

The Court: Who is Ray?

The Witness: Mr. Swanson.

\* \* \*

Q. Who said that?

A. I couldn't honestly answer that. They were both together and I talked to both of them. I don't really know which one did say that.

Q. Did they say anything to you that the cattle had been shipped to Mr. Miller?

A. He said the cattle were consigned to the Union Packing Company.

Q. Was there anything said about the Union Packing Company not taking the cattle?

A. No, there was nothing said about them not taking. The only conversation I had was that they decided to send the [142] cattle to the Union Stock Yards and sell them on the open market.

Q. Did you tell Mr. Swanson that the cattle would have to be diverted? A. Yes, I did.

Q. Did you tell that also to Mr. Miller?

A. Yes, they were together.

Q. Who prepared the diversion order?

A. My office did—possibly I had better say it like this: In order to divert cattle you have to have the car numbers that they originated in. Mr. Swanson had loaded the cattle up north so he gave those car numbers to my office and we, in turn, copied

(Testimony of Paul F. Hill.)

them down and Mr. Miller sent one of his men upstairs, that is, to the railroad office at the Union Stock Yards, and gave them the car numbers and diverted the cattle to the Southwest Commission Company.

Q. From then on did you have any further conversations with Mr. Miller or Mr. Swanson together?

A. Not that I recall; not at that time. I had conversations with Mr. Swanson because the cattle were delayed and we were trying to find them en route.

Q. How long were they delayed?

A. Several days would be all I could answer to that. [143]

\* \* \*

Q. Did you have any conversations with either of them before the cattle arrived?

A. Oh, yes, I saw Mr. Swanson practically every day.

Q. But not Mr. Miller? [144]

A. Well, that I don't recall. I see him almost every day, but I have no occasion to talk with him, I mean about these particular cattle. The cattle hadn't arrived.

Q. What did you do after the cattle came into the yards, did you sell them?

A. No, the cattle came in—as I recall it was on a Thursday. If you have a calendar I can tell. It is October 7th at 2:30 in the afternoon when they arrived at my yards and they were in bad condi-

(Testimony of Paul F. Hill.)

tion, and we decided, or rather I decided, not to show the cattle at all as they needed several days rest due to the bad shipment.

\* \* \*

Q. Did you sell them eventually?

A. I did.

Q. Did you obtain an extension of time during which these cattle could be sold for slaughter?

A. I did.

Q. How long an extension of time did you obtain?

A. As I recall, the time limit on these cattle was out [145] on Tuesday and I got in touch with Washington on Monday and got an extension for the cattle until the following Friday.

Q. What was the amount of time that you asked for?

A. I asked for 10 days.

Q. That time, however, was that sufficient for you to sell the cattle?

A. It was.

Q. And you sold the cattle?

A. I sold the cattle on the 11th of October.

Q. And you sold the cattle to the Union Packing Company?

A. I did.

Q. Did the Union Packing Company pay you for the cattle?

A. They did.

Q. Did you make account sales and payment for the cattle?

A. I did.

Q. I will show you Plaintiff's Exhibit 7 and ask you whether you have seen this before.

A. This is my account sale. That is the account of the sale of the cattle.



(Testimony of Paul F. Hill.)

Q. Do you remember in relation to the price which you got from the Union Packing Company for these cattle whether it was as high or higher than any other price that you were [147] able to get?

A. It was much higher.

Q. Did you charge a commission for the sale of the cattle?      A. I did.

Q. Who paid the commission?

A. Cariboo Land & Cattle Company.

Q. Did Mr. Swanson see you every day about the sale of these cattle?

A. Yes, he was there every day, I would say.

Q. Do you remember of your own recollection and knowledge the condition of the cattle when they came in here?      A. I do.

Q. What do you remember about their condition?

A. Well, they were in very bad condition, completely tired out, exhausted, you might say, and there were several head very badly bruised, and sore-footed, and just in bad condition.

Q. You didn't show them then primarily because of the condition for a few days after arrival?

A. I didn't show the cattle on Friday, which was the day following the date that they arrived, and of course Saturday we are closed, Sunday we are closed, and Monday when I brought the cattle out to sell them I only had until Tuesday because the cattle were billed for slaughter purposes only, and you have 14 days from the date of arrival in the United States in which to have the animal

(Testimony of Paul F. Hill.)

slaughtered. Due to the bad handling by the railroad these cattle were unloaded eight times from the point of entry to their destination. So I really had one day in order to show the cattle on the market until I got the extension.

\* \* \*

### Cross-Examination

By Mr. Mahl:

Q. Mr. Hill, the condition of these cattle when they arrived in Los Angeles was such that Mr. Miller was willing to pay 50 cents more than anyone else, isn't that correct, for them?

A. When they arrived in Los Angeles?

\* \* \*

Q. In any event, the end result is that Mr. Miller paid more than anybody else?

A. That is true. [149]

\* \* \*

Q. The Union Packing Company is not engaged in the commission business of selling cattle, are they?

A. No, not that I know of.

Q. Now the commission that you received was received by you by reason of the Union Packing Company sending to you a check, you deducted your commission and remitted the balance to Cariboo, isn't that right?

\* \* \*

A. Well, the Union Packing Company remitted to me for it—you might say, it wouldn't be gross, it would in a sense—anyway, for the amount of money that the cattle came to over the scales, and

(Testimony of Paul F. Hill.)

I in turn deducted the freight and handling charges.

Q. And your commission?

A. That is right, handling charges.

Q. And remitted the balance to Cariboo, that is correct, isn't it?      A. Yes, sir.

Q. In other words, you never received a check from [150] Cariboo for your commission, you merely deducted it?      A. No, sir.

The Court: Is it customary for commission agents to deduct freight and various charges?

The Witness: Absolutely.

\* \* \*

Q. Do you remember saying anything to me in substance that it was Mr. Miller's responsibility?

A. No. From the start of this deal Mr. Miller had told me that he and Mr. Swanson were the best of friends and he wanted him to get all that he could out of these cattle. I remember that.

Q. You didn't feel, at the time that you were discussing it with Mr. Miller, that he was obligated here?

A. I had no reason to think it at all, except that they came to me and diverted the cattle and he impressed upon me [151] every time I talked to him about it that he wanted to favor Mr. Swanson.

\* \* \*

Q. That is, Mr. Miller said that?

A. That is true.

Q. That he impressed on you that he wanted to favor Mr. Swanson?

A. He wanted to get all he could for his cattle.

(Testimony of Ray Swanson.)

RAY SWANSON

called as a witness by and on behalf of the defendant, having been previously duly sworn, was examined and testified as follows:

The Court: You are calling Mr. Swanson as your witness? He is no longer an employee but he was at the time of this transaction.

Mr. Shipman: I think the rule so applies.

The Court: You are calling him under Rule 43(b)?

Mr. Shipman: Yes.

The Court: Very well.

Cross-Examination

By Mr. Shipman:

Q. Mr. Swanson, I understood you to say that you tried to make a sale of these same cattle before they were shipped. A. Down here?

Q. Yes. A. Yes, I did.

Q. Where did you try to sell them?

A. I tried to sell them in Williams Lake and I tried to sell them in Vancouver.

Q. And that was before the shipment was made from—— A. Vancouver.

Q. ——from Vancouver?

A. That is right. [153]

Q. Did you also try to make sale of the same cattle from Williams Lake?

A. I didn't quite get the point.

Q. While you were at Williams Lake and before you went to Vancouver, did you try to sell them?

(Testimony of Ray Swanson.)

A. I tried to sell them there. In fact, I had them sold and the man in the packing company backed out.

The Court: I think we covered all that before.

Mr. Shipman: Yes, There is only one thing I want, your Honor, and that is whether an attempt was made to make a sale in Vancouver.

Q. Did you try to make a sale in Vancouver?

A. Yes.

Q. And the cattle were actually in Vancouver at the time? A. Right in the yards.

#### Recross-Examination

By Mr. Mahl:

Q. At the time of the attempted sale in Vancouver that you said you attempted to make, there was still over 250 head at the ranch, was there not?

A. I didn't hear you.

Q. At the time the cattle were in Vancouver, Mr. Swanson, there were considerably over 250 head of cattle at the [154] ranch, were there not?

A. Oh, yes.

Mr. Mahl: That is all.

Mr. Shipman: What were you trying to sell while you were in Vancouver?

The Witness: The cattle I had in Vancouver.

\* \* \*

#### ADOLPH MILLER

called as a witness by and on behalf of the defendant, having been duly sworn, was examined and testified as follows:



(Testimony of Adolph Miller.)

Direct Examination

By Mr. Shipman:

Q. Mr. Miller, do you remember more than one conversation with Mr. Swanson when he was at Williams Lake?

A. I think we had two talks, one in the forenoon and one in the afternoon. I am not quite positive but I think [155] there were two conversations.

Q. Now according to your recollection, what took place in the first conversation and what took place in the second conversation?

A. Mr. Swanson, as I recollect, called me and wanted to know what our market was like in Los Angeles, and I told him that we had a very sloppy market, and I also told him I thought, just merely as a friend of his, that I thought he would be better off to sell those cattle right there at home.

Q. Now if there were two conversations, do you think they were the same day?

A. If there were I think they would be, yes.

Q. Was there anything different said at the second conversation?

A. If I recollect, I think that I told Mr. Swanson in the second conversation—whether it was in the first or the second I don't recollect—that he would be better off to ship those cattle to the Union Sock Yards where he can probably get more bidders on the cattle and be satisfied, that if he had to ship them he would probably get a better price for them than I might be able to pay him if they come in for slaughter to me. In which he answered me—I would

(Testimony of Adolph Miller.)

like to finish that—that there was some hardship or red tape of shipping the cattle to a public market, and that it would be easier to ship them to the yards, to packers, and then divert [156] them into the Union yards.

I think that was the conversation that I had with Mr. Swanson from Williams Lake.

The Court: Anything further?

Q. (By Mr. Shipman): Mr. Miller, you testified that you tried to get Mr. Swanson after the receipt of the telegram. A. That is right.

Q. Were you going to talk to him?

A. Was I going to talk to him? A. Yes.

Q. Yes, sir.

Q. About what?

A. Still to explain what our conditions are in Los Angeles.

Q. And what else? A. That is all.

### Cross-Examination

By Mr. Mahl:

Q. The first conversation—and I am not trying to commit you that there were two conversations; you have said you cannot recall—but the first conversation I think you said you told him the market was sloppy in Los Angeles, is that right? [157]

A. That is right.

Q. Now at which of these conversations, or was it at one conversation, that it was talked about sending you the cattle?

A. Well, it was in one of the two conversations.

(Testimony of Adolph Miller.)

Q. Let us take the two conversations together—and I am not trying to pin you down to whether it was the first or the second; just what was said between you and Mr. Swanson that day—there was something said about sending the cattle to the Union Packing Company, wasn't there?

A. He told me that the cattle were ready to ship and he thought there might be a chance to sell the cattle along [158] the road or even in Williams Lake. I imagine that would have been the first conversation.

Q. There was conversation that day about sending them to the Union Packing Company? I think you have already said there was, but I want to get the record clear.

A. I imagine that there was.

\* \* \*

Q. Now would you say that this conversation took place from Williams Lake between September 24 and September 27, having in mind that the telegram was dated September 28th?

A. I would imagine so. [159]

\* \* \*

Q. Again I ask you if the price was \$47 to \$50 for commercial, 350 to 600, is that a bad price?

A. It must have been or I wouldn't have told him that.

\* \* \*

Q. Isn't the condition of your market pretty well set by these quotations from the Department of Agriculture?

A. No.

(Testimony of Adolph Miller.)

Q. You would accept these as being correct statements, wouldn't you.

A. Pretty much, yes. [161]

\* \* \*

The Court: How much margin would you figure to make on beef? Suppose you paid 40 cents a pound, or \$20 a hundred for dressed beef, what would you think you could make on it?

The Witness: Our business is operated on an average of about 11½ per cent. We are very happy if we can make 11½ per cent net profit.

The Court: On the turnover?

The Witness: That is right; net profit. [162]

\* \* \*

The Court: Is it the price at which a packing company like the defendant would buy cattle for, or is it a price at which they would be selling meat?

\* \* \*

The Witness: Selling.

\* \* \*

Mr. Mahl: The prices I quoted from are based on sales by packers and wholesalers to retailers and hotel supply houses. Those are the prices.

The Court: Very well. He has so testified. [163]

\* \* \*

The Court: When you received this wire, Plaintiff's Exhibit 1, you had your secretary put in a telephone call for Mr. Swanson?

The Witness: Either that or I might have put in that call myself.

(Testimony of Adolph Miller.)

The Court: You really wanted to get in touch with him? [164]

The Witness: That is right.

The Court: You tried to get in touch with him?

The Witness: That is right.

The Court: You were concerned, were you, when you saw this wire about 10 cars leaving noon today?

The Witness: Well, I was concerned to this extent, I knew what our market conditions were and Ray Swanson—I wanted to see that he got the best deal that he can on these cattle. I understood that Ray Swanson was interested in that cattle company.

The Court: But a day or so before you talked with him and told him if he could not sell them to send them on down, did you not?

The Witness: I don't really remember whether there were words to that extent, but I imagine that is probably what I told him.

The Court: Then why were you surprised when you got a wire that 10 cars were coming down?

The Witness: Well, I thought that he might be able to market them right there at better advantage at that point in British Columbia than he would by shipping them to Los Angeles.

The Court: Did you interpret this wire to mean that they were shipping these cattle to you or sending them down to the Union Stock Yards? [165]

The Witness: No, I really didn't know just what he was doing, but I figured he probably was shipping them to me.

The Court: You buy a lot of cattle, do you not?



(Testimony of Adolph Miller.)

The Witness: That is right.

The Court: Are you active? Are you one of these executives that spend your time playing gin rummy or golf, or do you work at your job?

The Witness: It all depends. Sometimes I am active.

The Court: You do a lot of buying yourself?

The Witness: Not now I don't.

The Court: Well, in 1948?

The Witness: I didn't do too much of it then either.

The Court: You talk to numerous people about deals on cattle, do you?

The Witness: I do.

The Court: What I am getting at, do you have so many of these conversations about cattle that it is hard for you to remember a particular conversation, about this particular lot?

The Witness: Yes, sir, I do. I have various conversations with different people in different parts of the country.

The Court: At this time when you talked with Mr. Wade, either in person or over the telephone, did you ever say to him that you would pay him 46 cents a pound dressed?

The Witness: I did not.

The Court: Or 2 cents for offal? [166]

The Witness: No, sir.

The Court: You did not?

The Witness: No, sir.

(Testimony of Adolph Miller.)

Cross-Examination

(Continued)

By Mr. Mahl:

Q. Your attempt to reach Mr. Swanson was the day you got the telegram? A. Yes, sir.

Q. And you tried to reach him because of the chaotic conditions of the beef market, is that right?

A. That is right.

Q. I show you one of these statements, Plaintiff's Exhibit 14, the last page, for the market conditions September 28 to 30, which reads: "Beef: Good steer showed a better representation than during previous weeks." Did you agree with that statement?

A. It is a Government report. That is probably what it is.

Q. That statement was made by the Government at the time you say you were trying to get Mr. Swanson to tell him [167] not to send the beef down because of the chaotic conditions of the market?

A. It probably was.

\* \* \*

The Court: I think we had better come back tomorrow morning at 10:00 o'clock.

Let me tell you so you can cogitate about this during your leisure hours and be able to direct my attention to those things I am interested in. [168]

Unless you can convince me differently, I am inclined to agree with the law on equitable estoppel or promissory estoppel. I think this case hinges on

a question of fact. I do not think there is very much law involved in it, because if there was an agreement orally then I think promissory estoppel would apply.

There are two things that concern me about this case that it is hard to decide. It involves the conduct of human beings, why people do certain things, which is a very difficult thing to determine, certainly for a judge, and I take it sometimes it is difficult for a person himself to determine why he did something. But here are two businessmen, executives of the plaintiff corporation, who ship 10 carloads of cattle from Canada to Los Angeles. It is hard for me to believe that if they had not had the conversations which they claimed they had with Mr. Miller that they would have shipped the cattle. Mr. Miller says that he does not recall or that there was no such conversation. It would certainly be very bold and daring for an executive of a cattle company to gather up 250 head of cattle, 10 carloads of cattle, and ship them to a man 1400 miles away. That bothers me.

On the other hand, the other point is the matter concerning Mr. Miller's conduct when the cattle came. Had these men just shipped cattle to him without any understanding on his part that they were coming down, what would the ordinary [169] man have done? If I were Mr. Miller and I was in business and the plaintiff corporation purported to ship me 10 carloads of cattle that I had no contract with and hadn't ordered, I probably would have "blown my top." I am a pretty reasonable sort of

fellow most of the time, but I probably would have said, "What is going on here? You fellows are shipping me cattle that I didn't order." And then you find him proceeding to assist in arranging for the sale elsewhere. [170]

\* \* \*

Your Honor, I have here a case in 97 F. (2d) 420, *Wood v. Moore*. I think the reading of the whole case is necessary, your Honor. It bears very much upon the point here involved.

The Court: How long a case is it?

Mr. Shipman: It consists of about 8 pages, your Honor.

The Court: Hand it up to me and I will look at it.

(The volume referred to was passed to the court.)

The Court: There is no contention in this case of equitable estoppel, is there?

Mr. Shipman: Yes, sir. The court, on page 409 especially, discusses that matter.

The Court: It is not shown in the headnote. Point out to me where there is anything about equitable estoppel. Maybe we can save some time. It is a case where, on the facts, the court held that they had not sustained their burden of proof to take it out of the statute of frauds.

Mr. Shipman: Right here, your Honor. (Indicating.)

The Court: I know, they discussed the question of estoppel as to the agent's authority in writing.

Mr. Shipman: That is right.

The Court: But I can find no discussion about reliance or change of position.

Mr. Shipman: It states:

“We see no reason for applying a different rule in respect to this contention than that applicable [194] where estoppel is claimed with respect to the statute of frauds proper. In the latter case it is necessary to show not only a change of position to the injury of the party asserting the estoppel, but also that there has been a conduct on the part of the opposite party amounting to a representation that he will not avail himself of the statute to escape his agreement.”

The Court: Read that last sentence again.

Mr. Shipman: “\* \* \* but also that there has been a conduct on the part of the opposite party amounting to a representation that he will not avail himself of the statute to escape his agreement.”

The Court: With all due respect to my superior, Judge Stephens, I do not think that that is the law. I think that goes too far. That case is a diversity of citizenship case, is it not, the one you are reading from?

Mr. Shipman: Yes.

The Court: In a diversity of citizenship case we are bound by the law of the state in which the case is tried. I am bound by California law, and from what I have read of these California cases I think that that is a very narrow construction, if that is what the court means.



Mr. Mahl: May I inquire as to the date of that case? The Court: 1938. [195]

Mr. Shipman: May 27, 1938.

The Court: What does he cite in support of that statement?

Mr. Shipman: Seymour v. Oelrichs, the identical case.

The Court: 156 Cal.?

Mr. Shipman: Yes.

The Court: Does he cite any of the later California cases? [196]

\* \* \*

### Memorandum of Opinion

The Court: I have not been on this bench very long and I have not tried as many cases as some of the other judges have, but this is probably the closest case that I have had to decide since I have been on this bench. It is difficult to determine just what the situation is because of the disputed facts.

Sometimes when it is difficult to determine what happened by listening to testimony of witnesses, having in mind that they are human beings and they may not remember, may not want to remember, may honestly be unable to remember, or may remember wrongfully, it is helpful to drop back upon facts which are not dependent upon the memory of human beings. I am inclined to think that in this case there are facts of that kind which assist in arriving at a decision.

In this case I am inclined to think that it was a continuing offer rather than a contract on September 10th; that the plaintiff, by virtue of the tele-

phone conversations had from the north, was justified in sending the cattle on south relying upon the offer not having been revoked; that although it was only an oral agreement the doctrine of promissory [203] estoppel applies and it would create an unconscionable hardship to permit the defendant to plead the statute of frauds. And I conclude that the plaintiff is entitled to judgment. I have checked the computations made by the plaintiff's attorney, and it seems to me that \$12,503.17 is the correct amount.

Now to get back to these facts which help, aside from the testimony of witnesses, to decide this case. The defendant had contracts with the Army. I have not checked them this morning but it seemed to me that the price of the meat was approximately 69 cents a pound, or at least it was in the 60 cent bracket. These contracts were canceled on October 4th. The Army contracts totaled some 200,000 pounds of meat. As long as those contracts continued, whereby the defendant could process meat and sell it for some 60 cents, he could well have afforded, regardless of what happened to the market, to have bought this meat at 46 cents and not necessarily used this meat to fulfill the contract, but lots of meat was being handled and it just meant that here was 146,000 pounds of meat available for his needs. But the minute those contracts were canceled, and the record does not show that he knew beforehand that they were going to be canceled, but the practical matter is that somewhere before the 4th of October probably he had some notice of it,

certainly he did on October 4th, that he was not going to need as much meat as he had needed [204] before. Secondly, he was not in a position to take 46 cent meat and turn it over at a profit as he could under the Army contracts.

Secondly, the physical facts of the market are shown by the Exhibits 14 and 15, and are most significant in that apparently during the month of September the market was up pretty fair, 47 cents, 48 cents, 50 cents. Mr. Miller has testified that his profit on turnover was a very minor one of 1 per cent or more on the turnover. It was obvious, therefore, that with the market in that shape he could have taken this meat, turned it over and made money. But then happens one of those strange things—why it should happen while these cattle were en route no one can say—but the market drops and it would not have been possible to turn the meat over.

I attach significance to those two facts, not dependent upon human testimony, as being the possible explanation of why Mr. Miller's attitude changed and he contended that he had no deal.

It is hard for me to believe that two men in business, such as the officers of the plaintiff corporation, would have shipped 10 loads of cattle unless they were relying upon the conversations which they testified to and the conversations from the north indicating that they had a deal, indicating that Mr. Miller was willing to take the cattle at the 46 cent price. [205]

As to Mr. Miller, I am inclined to think that

maybe he has so many conversations about stock, cattle, so many duties in connection with his business, that he may not even have recalled some of the conversations that he had. It is entirely possible that in the hurry of business a man might make a commitment and then possibly not be able to realize that he had made it, and that someone else had relied upon it.

In preparing findings I want the plaintiff to show how you arrive at the amount of the figure in the judgment. I am not going to be one of these judges who has to have a post-mortem on his case after the Circuit decides, either to show that the Circuit was wrong or he was right, but I have read a number of decisions from the Circuit recently in which District Courts have been reversed because there was no explanation so that the Circuit Court could understand how the District judge arrived at the decision. Therefore, for the purpose only of avoiding retrials of actions and not to benefit me in any false pride in being affirmed in the case, will you see to it that your findings show how you arrived at the amount of this judgment?

I want to compliment both counsel. The case was well tried and you were both well prepared and you did not waste time over facts which were not in dispute.

As I see it, the case rests upon a question of fact. I [206] do not think that the law is seriously in dispute.

Mr. Shipman: I would like to call your Honor's



attention to one matter. The court has naturally, as anyone sitting upon the bench and listening to two opposite stories might attach itself to some stray matters, but your Honor's conclusion in regard to the contract for the Army, or whoever it was, I must say is erroneously stated for the reason, may it please the court, that when the court refers to a price of 60 cents a pound, in fairness to the defendant the court must have observed that it is a boned price. In other words, it is pure meat with the bone cut out. Therefore unless that matter was not material to the case, and to be fair and just to the defendant, I think it would be necessary to take that into account for the purpose of determining the difference in weight, if that probative fact is important.

The Court: I stand corrected. I should have noticed that there was some processing in the price involving 60 cents. However, I think it would be logically correct that the contract undoubtedly was of some value to the defendant. It was a profitable contract, because the Army apparently terminated it upon the ground that they could purchase meats at a cheaper price. At least that is stated in the exhibit.

Mr. Shipman: Yes. And those cancellations, may it please the court, took place after the transaction between Mr. Miller and Mr. Swanson. [207]

The Court: They took place before the cattle arrived in Los Angeles?

Mr. Shipman: That is correct, but after the arrival of Mr. Swanson.



The Court: I have that in mind.

Mr. Shipman: I just wanted to be fair to the court in that respect.

\* \* \*

The Court: Counsel, I find that there was a telephone conversation in which Mr. Swanson talked to Mr. Miller and Mr. Miller said, "Send the cattle on down, I have got a deal." Therefore they sent the cattle down in reliance on his previous arrangement that he would pay 46 cents a pound, and when they shipped the cattle the cost of the shipping and the cost of the customs duties was reliance and a change in position which bound him to the oral agreement. [208]

If I am wrong on the law you have your remedy of appeal. It is a lot easier to appeal on questions of law than it is on questions of fact. I have ruled against you on your view of the law; therefore it is an easier kind of an appeal to take. [209]

\* \* \*

#### Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 26th day of June, A.D. 1950.

/s/ AGNAR WAHLBERG,  
Official Reporter.

[Endorsed]: Filed September 11, 1950.

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[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 37, inclusive, contain the original Complaint for Money; Answer; Objections of Defendant to Form of Findings of Fact and Conclusions of Law; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Order of Court; Undertaking on Appeal and to Stay Execution; and Designations of Record on Appeal and a full, true and correct copy of minute order entered July 25, 1950, which together with Copy of Reporter's transcript of proceedings on June 20 and 21, 1950, and original Plaintiff's Exhibits 1, 2-A to 2-E, 3-A, 3-B, 3-C1 to 3-C-8, 4-A to 4-D, 5-A, 5-B, and 6 to 15, all inclusive, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 2nd day of October, A.D. 1950.

EDMUND L. SMITH,  
Clerk.

[Seal] By /s/ THEODORE HOCKE,  
Chief Deputy.

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[Endorsed]: No. 12703. United States Court of Appeals for the Ninth Circuit. Union Packing Company, Appellant, vs. Cariboo Land & Cattle Co., Ltd., Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed October 3, 1950.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

United States Circuit Court of Appeals for  
the Ninth Circuit

No. 12703

CARIBOO LAND & CATTLE CO., LTD., a Corporation,

Plaintiff and Appellee,

vs.

UNION PACKING COMPANY, a Corporation,  
Defendant and Appellant.

STATEMENT OF POINTS UPON WHICH DEFENDANT AND APPELLANT INTENDS TO RELY ON APPEAL (RULE 19-6)

Pursuant to Rule 19, Subdivision 6, of this Court, Defendant and Appellant hereby designates the points on which it intends to rely on appeal:

I.

The Findings of the Trial Court do not support the judgment.

II.

The Findings of the Trial Court are self-contradictory and outside the issues in material respects.

III.

The evidence does not support the Findings of the Trial Court.

IV.

The judgment and decision is against law.

The judgment is erroneous in enforcing an as-

served oral contract for the purchase of cattle of a value of more than \$50,000.00, which is invalid under the Statute of Frauds.

Dated: October 12, 1950.

/s/ BENJ. W. SHIPMAN,  
Attorney for Defendant and Appellant Union Packing Company.

Receipt of copy acknowledged.

Endorsed]: Filed October 14, 1950.

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[[Title of Court of Appeals and Cause.]

### STIPULATION

It is hereby stipulated by and between counsel for the respective parties to this appeal that the exhibits introduced during the trial of the cause in the United States District Court may be considered in their original form by the Court during the consideration of the appeal taken without reproduction, and that, in the meantime, said exhibits may be returned to the trial court and there be made available to the respective parties to this appeal in the course of the preparation thereof.

Dated: October 23, 1950.

/s/ FREDERICK D. WAHL, JR.,  
Attorney for Plaintiff and  
Appellee.

/s/ BENJAMIN W. SHIPMAN,  
Attorney for Defendant and  
Appellant.



It Is So Ordered.

/s/ WILLIAM DENMAN,

Chief Justice.

/s/ WILLIAM HEALY,

/s/ H. T. BONE,

Judges U. S. Court of Ap-  
peals for the Ninth Circuit.

[Endorsed]: Filed October 27, 1950.

